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Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 11

NICO JACOBELLIS, APPELLANT,

vs.

OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JUNE 7, 1962
PROBABLE JURISDICTION NOTED OCTOBER 8, 1962

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 164

NICO JACOBELLIS, APPELLANT,

vs.

OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. A]

IN THE
COURT OF COMMON PLEAS
CRIMINAL DIVISION, COUNTY OF CUYAHOGA
STATE OF OHIO

Indictment—Possession of Obscene Film, with Count Exhibiting Obscene Motion Picture Film R.C. 2905.34

No. 72175

C. of A. 25303

STATE OF OHIO, Plaintiff,

vs.

NICO JACOBELLIS, Defendant.

DOCKET AND JOURNAL ENTRIES

November 25, 1959:

To Court: This day came the Jurors of the Grand Jury and having found now present to the court by and through their foreman a certain Bill of Indictment against the following indicated crime, endorsed by said foreman, "A True Bill" and signed by him as foreman aforesaid, enumerated as follows:

No. 72175. State of Ohio vs. Nico Jacobellis—Indictment—Possession of Obscene Film, with count, Exhibiting Obscene Motion Picture Film. Jr. 92, pg 410

November 30, 1959:

To Court: Now comes the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being

[Stamp—Filed—JUL 7 1961, SUPREME COURT OF OHIO, JOHN W. McMILLAN, Clerk.]

[Stamp—Filed—COURT OF APPEALS, JUN 23 1960, EMIL J. MASGAY, Clerk of Courts, Cuyahoga County, Ohio.]

brought into court in custody of the sheriff was arraigned upon said indictment, and for plea thereto saith he is not guilty; and puts himself upon the country, and the prosecuting attorney doth the like. Bail is fixed at $500.00.
Jr. 92-427

November 30, 1959:

This day comes defendant Nico Jacobellis and gives recognizance No. 38743 in the sum of $500.00, personal bond.
Jr 92-432

[fol. B]

December 14, 1959:

Request for Bill of Particulars under R.C. 2941.7 filed.

December 14, 1959:

Brief and Notice filed.

February 4, 1960:

To Court. This cause came on this day for hearing on defendant's motion for Bill of Particulars, and the court upon hearing overruled said motion.
Jr. 92, pg 775.

February 4, 1960:

Memorandum filed by Judge Nicola.

March 15, 1960:

Motion requesting trial by three judges filed.

March 16, 1960:

To Court: This cause came on this day for hearing on defendant's motion for trial by three judge panel, and the court upon hearing grants said motion.
Jr. 92, pg 975.

April 4, 1960:

Bill of Particulars filed.

April 21, 1960:

Motion to Quash Indictment filed.

April 23, 1960:

To Court: This cause came on this day for hearing on defendant's motion to quash indictment, and the court upon hearing overruled the same. Exceptions. This cause is set for trial on May 23, 1960.

Jr. 93, page 33

May 6, 1960:

To Court: This cause came on this day for hearing on oral motion of defendant to amend application for commission to take depositions, by striking certain words from paragraph 4 "d" of the affidavit attached thereto, and forming part of the said application, and the court upon hearing grants said application, and orders same amended. State excepts. Jr. 93, pg 99

[fol. C]

May 9, 1960:

Notice to Take Depositions filed.

May 17, 1960:

Demurrer to Indictment, Brief and Notice filed by defendant.

May 19, 1960:

Depositions received from New York, N.Y.

May 23, 1960:

To Court: Now comes the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming, with an official court reporter in attendance, whose fee is ordered taxed as costs in this case; and thereupon, the defendant herein, in writing, and orally, waives his right to a trial by jury, and submits this case to the court for trial by three judges,—John D. Pincura, William J. McDermott, and Roy F. McMahon.

Thereupon, this cause came on for hearing on defendant's demurrer to the indictment, and the court upon hearing overruled the same.

And thereupon, the defendant withdrew his plea of not guilty and entered motion to quash indictment, and the court upon hearing said motion overruled same. Whereupon, the defendant re-entered his plea of not guilty.

And now this cause came on for hearing on motion of both parties to exclude witnesses, and the court upon hearing grants said motion.

And the said court having heard the testimony in part this case is continued until tomorrow morning.

Jr. 93, pg 194

[fol. D]

May 24, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming; and a jury having been waived, the trial proceeded to court by Judges Roy McMahon, Wm. McDermott, and John Pincura.

Thereupon, the court adjourned to the office of 20th Century Fox Company, Film Building, where court was reconvened and a showing of the film (Les Amants—The Lovers) was viewed by the court; and after said showing court re-convened in Court Room 3.

And the said court having heard the testimony in part this case is continued until May 25, 1960.

Jr. 93, pg 200.

May 25, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel coming also; and a jury having been waived the trial proceeded to court by Judges William McDermott, Roy McMahon, and John Pincura, and the trial proceeded.

And the said court having heard the testimony in part this case is continued until tomorrow morning.

Jr. 93, pg 202

May 26, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming; and a jury having been waived the trial proceeded to court by Judges William McDermott, Roy McMahon, and John Pincura.

And the said court having heard the testimony in part this case is continued until May 27, 1960. Jr. 93.208.

[fol. E]
May 27, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming; and a jury having been waived, the trial proceeded to court by Judges Wm. McDermott, John Pincura, and Roy McMahon, and the trial proceeded.

And the said court having heard the testimony in part this case is continued until Tuesday morning, May 31, 1960.

Jr. 93-pg 220.

May 31, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming; and a jury having been waived, the trial proceeded to court by Judges Wm. McDermott, Roy McMahon, and John Pincura.

And now, the testimony of the State being concluded, defendant moved for finding of not guilty, and for discharge, and the court upon hearing overruled said motion.

Thereupon, the defendant entered a motion to quash indictment, and the court upon hearing overruled said motion, and all other motions. Exceptions.

And the court having heard the testimony in part this case is continued until tomorrow morning.

Jr. 92, page 230

[fol. F]

June 1, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel coming also; and a jury having been waived, the trial proceeded to court by Judges Wm. McDermott, Roy McMahon, and John Pincura, and the trial proceeded.

And the said court having heard the testimony in part this case is continued until tomorrow morning.

Jr. 93, pg 243.

June 2, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming; and a jury having been waived, the trial proceeded to court by Judges Wm. McDermott, Roy McMahon, and John Pincura, and the trial proceeded.

And the said court having heard the testimony in part, this case is continued until tomorrow morning.

Jr. 93, pg 246

June 3, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming; and a jury having been waived, the trial proceeded to court by Judges John Pincura, Wm. McDermott, and Roy McMahon.

And now, this cause came on for hearing on defendant's motion to quash indictment, and for discharge, and

the court upon hearing overruled said motion. And thereupon said defendant entered a demurrer to the indictment, and the court upon hearing overruled same.

And the said court having heard all the testimony adduced, and the arguments of counsel, adjourned this case for deliberation. Jr. 93, pg 253.

[fol. G]
June 8, 1960:

Memorandum filed.

June 8, 1960:

To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Nico Jacobellis being brought into court in custody of the sheriff; his counsel also coming, and a jury having been waived, the case proceeded to trial before judges William McDermott, Roy McMahon, and John Pincura.

And now the said court, after due deliberation, unanimously adjudged defendant Nico Jacobellis guilty of possession of obscene film, and exhibiting obscene motion picture film, as charged in the indictment.

Thereupon, the said court referred the defendant to the Probation Department for investigation and report, pursuant to R.C. 2951.03. Jr 93, pg 277.

June 14, 1960:

Notice of Appeal filed.

June 15, 1960:

Precipe for Transcript to Court of Appeals filed.

June 14, 1960:

The defendant herein, Jacobellis, having been heretofore adjudged guilty of possession of obscene films, with count exhibiting obscene motion picture film, was this day brought into court in custody of the sheriff

for sentence, and thereupon the court inquired of said defendant if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the court that defendant Nico Jacobellis pay a fine of $500.00 on the first count in the indictment; and that he pay a fine of $2000.00 on the second count of the indictment, and that he pay the costs of this prosecution; and that he stand committed to the Workhouse of the City of Cleveland until said fines and costs are paid, or secured to be paid, or until he be otherwise legally discharged therefrom.

And now this cause came on for hearing on defendant's [fol. H]
motion for a new trial, and motion for judgment notwithstanding verdict, and the court upon hearing overrules said motions.

Thereupon, the defendant is released on same bond, pending appeal. —Wm. McDermott, Roy McMahon, John Pincura, judges. Jr. 93,-314.

June 15, 1960:

To Court: It is ordered by the court that execution of sentence is stayed pending appeal. Jr. 93, pg 316.

June 16, 1960:

To Court: It is ordered by the court that invoice from Twentieth Century Fox Film Corporation for $36.50, in this cause is to be paid forthwith from the County Treasury, and is to be taxed as costs in this case.

/s/ William J. McDermott; John Pincura, Roy McMahon, Judges. Jr. 93, page 332.

[fol. I] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. J]

IN THE COURT OF COMMON PLEAS

R C 2905.34

The State of Ohio,
Cuyahoga County, ss.:

INDICTMENT FOR POSSESSION OF OBSCENE FILM W/C EXHIBITING OBSCENE FILM

Of the term of September. In the year of our Lord one thousand, nine hundred and Fifty Nine.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, In The Name And By The Authority Of The State Of Ohio,

Do Find and Present, That Nico Jacobellis on or about the 13th day of November 1959, at the County aforesaid,

> unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious Motion Picture Film, to-wit:
>
> (Les Amants) "The Lovers"
>
> Said Motion Picture Film being so indecent and immoral in its nature that the same would be offensive to the Court, and improper to be placed upon the records thereof,

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

John T. Corrigan, Prosecuting Attorney.

[fol. K]

IN THE COURT OF COMMON PLEAS

R C 2905.34

The State of Ohio,
Cuyahoga County, ss.:

INDICTMENT FOR EXHIBITING OBSCENE MOTION PICTURE FILM

Of the term of September. In the year of our Lord one thousand nine hundred and Fifty Nine.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, In The Name And By The Authority Of The State Of Ohio,

Do Find and Present, That Nico Jacobellis on or about the 13th day of November 1959, at the County aforesaid,

> unlawfully and knowingly exhibited a certain obscene, lewd and lascivious Motion Picture Film, to-wit:
>
> (Les Amants) "The Lovers"
>
> Said Motion Picture Film being so indecent and immoral in its nature that the same would be offensive to the Court, and improper to be placed upon the records thereof

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

John T. Corrigan, Prosecuting Attorney.

[fol. 1]

State of Ohio,
County of Cuyahoga, ss.:

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
Case No. 72,175.

STATE OF OHIO, Plaintiff,
vs.
NICO JACOBELLIS, Defendant.

Defendant's Bill of Exceptions

Before: Hon. William J. McDermott, Presiding Judge, Hon. Roy F. McMahon, Judge, and Hon. John D. Pincura, Visiting Judge, Court of Common Pleas of Cuyahoga County, Criminal Division, Room No. 3, May 23, 1960.

[fol. 2] APPEARANCES:

Mr. John T. Corrigan, Cuyahoga County Prosecutor, by Mr. Thomas L. Osborne, and Mr. Bernard J. Stuplinski, Assistant Cuyahoga County Prosecutors, For the State of Ohio.

Messrs. Rocker, Zaller, Kleinman, and Annan, by Mr. Bennet Kleinman, and Messrs. Terrell, Williams, and Salim, by Mr. Seymour A. Terrell, and Messrs. Wright, Harlor, Morris, Arnold & Glander, by Mr. Harry Wright III, For the Defendant.

. . . . . .

[fol. 63]

Monday afternoon, May 23, 1960, at 2:00 P. M.

COURT'S RULING ON DEMURRER

Judge McDermott: Is everybody here, gentlemen?

Here is the ruling on the demurrer which was heard this morning by the Court:

This trial Court unanimously agrees that it is bound by the case of the State of Ohio vs. Dollree Mapp, 170 - O. S. - 427, and by the appellate decision therein, in which the constitutionality of Revised Code 2905.34 is upheld; and, therefore, this Court is overruling the demurrer herein, to which defendant may save his exception.

• • • • • • •

[fol. 70] Monday, May 23, 1960, at 2:45 P. M.

Judge McDermott: Now, Mr. Osborne, we are ready for your opening statement.

OPENING STATEMENT IN BEHALF OF THE STATE OF OHIO

Mr. Osborne: May it please the Court, and gentlemen at the trial table, at this time I wish to read the two counts of the indictment and the bill of particulars in this case, and I wish that in toto, the counts of the indictment and the bill of particulars be considered as part of my opening statement.

Judge McDermott: The record may so show that they are.

Mr. Osborne: Thank you, your Honor.

Count No. 1, The State of Ohio, County of Cuyahoga, of the term of September, in the year of our Lord, 1959, the jurors of the Grand Jury of the State of Ohio within and for the body and of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that Nico Jacobellis on or about the 13th day of November, 1959, unlawfully and knowingly had in [fol. 71] his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to wit: (Les Amants) "The Lovers", said motion picture film being indecent in nature, and that the same would be offensive to

the Court and improper to place in the records thereof, and contrary to the statute, and against the peace and dignity of the State of Ohio.

The original of the first count of the indictment is signed by John T. Corrigan, County Prosecutor.

The second count of the indictment, omitting the formal portion, but I request that the formal portion be considered as part of my opening statement—

Judge McDermott: The record may so show.

Mr. Osborne: Thank you, your Honor.

It reads that the grand jurors within and for the State of Ohio, on their oaths, and in the name and by the authority of the State of Ohio do find and present that Nico Jacobellis on or about the 13th day of November, 1959, in the county aforesaid unlawfully and knowingly exhibited a [fol. 72] certain obscene, lewd, and lascivious motion picture film, to wit: (Les Amants) "The Lovers", said motion picture film being indecent and immoral in nature, that the same would be offensive to the Court, and improper to be placed upon the records thereof, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

This was signed by John T. Corrigan, Cuyahoga County Prosecutor.

Filed in this case is a bill of particulars, and, omitting the formal caption, it reads:

Responding to the request of the defendant for a bill of particulars, the prosecuting attorney says that on the trial of the above entitled cause plaintiff will prove:

(A) That the defendant had said motion picture film in his possession and under his control in his position and capacity and authority as manager proprietor, and local responsible head, and having charge of the operations of the Heights Art Theater, a movie house in the City of Cleveland Heights, and in which movie house the said mo- [fol. 73] tion picture film was located and at which this same motion picture film was exhibited.

(B) That the defendant in his position and capacity as manager proprietor and local responsible head, and having charge of the operations of the said Heights Art Theater,

exhibited said motion picture film through a projector casting images from the said motion picture film onto a surface commonly known as a movie screen in view of the theater patrons, and which projection caused words spoken and music, and other sounds to be transmitted from a sound track and said through the amplifier, and made audible to the theater patrons.

This was signed John T. Corrigan, by Thomas L. Osborne, and Bernard J. Stuplinski, Assistant County Prosecutors.

The State will present witnesses in this case to prove among other things that the actions complained of took place within this jurisdiction of Cuyahoga County, and specifically at 2781 Euclid Heights Boulevard, Cleveland Heights, Ohio.

The evidence will show that the Heights Art Theater is a [fol. 74] movie house located at the address that I have mentioned, within the municipality of Cleveland Heights; and the evidence will further show that this defendant, Nico Jacobellis, is the manager of the Heights Art Theater, and that he is the proprietor and local responsible head, and in charge of the operations of that movie house.

The evidence will show that Nico Jacobellis had held that capacity in reference to the Heights Art Theater for quite sometime, in excess of two years, prior to the commission of the acts complained of in the indictment, and over that period of time police officers of the Cleveland Heights Police Department had been in contact with him on at least two or three occasions with reference to the material and films being exhibited in the Heights Art Theater.

It will further be shown that on and before Thursday, November 12, 1959, the scheduled showing of the film in issue entitled "The Lovers," in English, and in French, "Les Amants", was advertised in the local newspapers of greater Cleveland, and that the film was scheduled for its initial showing on Thursday, November 12, 1959, during the eve- [fol. 75] ning hours.

The evidence will further show that Captain Gordon of the Cleveland Heights Police Department, acting under orders of his superior, made contact with Mr. Jacobellis during the afternoon hours of Thursday, November 12, 1959,

and inquired about the film to be shown beginning that evening, that is, the film in question, and he was assured—Captain Gordon was assured by the defendant that the picture was scheduled for that evening.

Captain Gordon viewed one of the showings that evening, and the evidence will show that on Thursday, November 12, 1959, there were two showings of the movie on that evening; and the following evening, the date mentioned in the indictment, there were more showings, at which time Captain Gordon, accompanied by the city law director of Cleveland Heights, Ohio, Wilmot King, and the County Prosecutor of Cuyahoga County, John T. Corrigan, observed one of the showings on November 13th, the second day of its running, and that during the fourth showing of the film, that is, the second showing on November 13—it had been shown twice on November 12th, the officers of [fol. 76] the Cleveland Police Department—

Mr. Terrell: Cleveland Heights Police Department.

Mr. Osborne: Thank you. Cleveland Heights Police Department halted the showing and took into their possession the motion picture film, and arrested the manager, this defendant.

The evidence will further show that at the time of the showing of the film mentioned in the indictment, the date of the time mentioned in the indictment, and before that time, this defendant was well acquainted with the contents of the film. He had seen it on more than one occasion.

Within a few days after the arrest of this defendant the evidence, including a showing of the motion picture film, was presented to the Grand Jury of this county, and subsequent thereto the Grand Jury returned a true bill, an indictment charging this defendant with those violations under Section 2905.34 of the Revised Code, charging that he had knowingly had in his possession and under his con- [fol. 77] trol an obscene motion picture film, and, secondly, that he knowingly had exhibited an obscene motion picture film, in both cases being the film in issue.

The evidence will show in this case not only beyond a reasonable doubt but beyond any doubt whatsoever that the movie is in violation of the law.

The dominant theme of the picture taken as a whole appeals to the prurient interests of the average person, applying contemporary community standards.

It will be shown that the movie deals with sex in such a way as to excite lustful thoughts. It will be shown that the movie is immoral in that it has relation to sexual impurity, and has a substantial tendency to excite lustful thoughts. It will be shown that this movie has a substantial tendency to deprave its viewers by exciting lustful desires.

Mr. Terrell: If the Court please, the test here is not how it affects everyone, but the test is how it affects the average man with normal sex—and that has been laid down by the Circuit Court of Appeals of the Sixth District.

[fol. 78] Judge McDermott: Is that what you expect your evidence will show?

Mr. Osborne: We will show that, your Honor.

We will also show that this movie is calculated to appeal to all viewers' prurient interest, and it is dirt for dirt's sake, or, rather, dirt for money's sake.

Mr. Terrell: I object, because the test is dirt for dirt's sake and not dirt for money sake, and I think that is an unfair statement to make at this time, and I ask that be stricken from the record.

Mr. Osborne: Your Honor—

Judge McDermott: That statement, Mr. Prosecutor, should it not be corrected, dirt for money's sake?

Mr. Osborne: I am representing, your Honor, that the State will show this beyond—

Judge McDermott: Overrule your objection, and what he is saying is not evidence but what he expects it to be shown that way.

Mr. Terrell: Exception.

Mr. Osborne: It will be further shown that this movie has [fol. 79] no redeeming qualities.

It will further be shown that from the beginning of the movie to the end the dominant purpose of this movie, and it gets its appeal from its calculated purpose of appealing to the prurient interest.

From the very beginning of the film when it begins with a symbolic map on the screen upon which are superimposed titles in credit lines, the Court will have an opportunity to

view that symbolic matter, and to determine what that map symbolizes, and what it indicates, and to determine for itself what that symbolic map represents as far as dominant purpose of this movie is concerned.

Throughout the picture, through the course of the narrative where the wife, the so-called heroine of the picture, makes frequent trips from her home, from a spot outside of Paris, and rather a rural community, going to Paris to seek adventure and the gay life, and through the portion of time where she meets an archeologist who gives her a ride when her car breaks down and drives her back to her home, and to the point of time where she meets him in the early morn- [fol. 80] ing hours, when he is invited to stay overnight, and through the scenes where she strolls through the estate of the large residence in which she lives with her husband, a newspaper publisher, and her young daughter of approximately eight years, and through the scenes where she wanders through the estate in the early morning hours and makes passionate love to the archeologist in the shadow of her home, the shadow of the place where her husband is and her young daughter is sleeping, and where the other house guests are; and through the scenes where he makes violent and passionate love to her, and through the scenes where she rides in a boat with him down a nearby creek, and the love and passionate scenes are intensified between this married woman and an archeologist, someone other than her husband, and through the scenes where she takes this man up into her home and into her own bedroom after passing through her sleeping daughter's bedroom, into her bedroom where she begins to remove his clothing and he removes her clothing, and the Court may well infer to the point that it will be shown that these two persons were naked in her own bedroom, and through the scenes where [fol. 81] he makes passionate and violent love to her in her bedroom, and she with him, and he places her on the bed and makes violent love again to her; and down to the scene where the Court will infer what acts of sexual connection took place between the two on the bed in that bedroom.

Mr. Terrell: If the Court please, I think inference is beyond opening argument, what the Court will infer, and it is what the State intends to prove and not what the Court

will infer, and I am trying very much to keep this within legal bounds and not let that spread all over the county.

Mr. Osborne: Your Honor, it is what each side will show.

Judge McDermott: Go ahead, and the Prosecutor said that he will do that; and he has that right, and this is not evidence yet.

Mr. Osborne: And the scenes will be shown, and the evidence will show this as to what takes place in that bedroom which is through the scenes where the woman leaves the bed and goes into a bathtub, at which time she is joined by this man in the bathtub, and then the evidence will show [fol. 82] the violent scenes of passion that take place between them; and the evidence will show that they return from the bathtub into the bed where the acts of sexual passion are continued, and the evidence will show that within a short time thereafter, a matter of a few short hours, she and this archeologist abandon her home and abandon her husband and her daughter, and they go off into the future together.

I say that the evidence will show, your Honor, in this case that the film deals with sex, its predominant theme is sex, and it deals with sex in such a manner as to arouse lustful thoughts and desires, and to the average person applying contemporary community standards this film has the effect of arousing the prurient interest.

The evidence will further show, your Honors, in this case that all of the action is built up to the point where the sexual connection takes place between this man and this woman, and that it moves slowly and methodically and purposely up to this point of time where the sexual connection takes place, and thereafter it comes to an almost immediate conclusion.

[fol. 83] We say, your Honors, that the State will prove in this case, as mentioned earlier, not only beyond a reasonable doubt but beyond every doubt whatsoever that the possession of this film is in violation of the law of Ohio, they having it under their custody and control, defendant's custody and control, and that is in violation of the laws of the State of Ohio, and the exhibition of the film is also in violation of the laws of the State of Ohio.

Judge McDermott: Now, for the defense, gentlemen.

[fol. 84]

OPENING STATEMENT IN BEHALF OF THE DEFENDANT

Mr. Kleinman: If the Court please, this case involves the prosecution of Nico Jacobellis, the defendant, under an indictment returned by the Grand Jury of Cuyahoga County on November 24, 1959, in which the Grand Jury charged that the defendant on or about the 13th day of November, 1959, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit: (Les Amants) "The Lovers". The indictment further contains a second count charging the defendant on the same day with unlawfully and knowingly exhibiting the same motion picture film.

The evidence in this case will show that Nico Jacobellis, the defendant, is a man thirty-seven years of age, who was born in Bari, Italy, and came to this country in 1948. The defendant received his primary education in Italy; and, since his arrival in the United States, he has attended Western Reserve University under a scholarship grant, and taken graduate work at that institution. He has been [fol. 85] active in the Cleveland Play House as a trainee and as a dramatic artist.

He has been associated with the Heights Art Theater since 1955.

The evidence will show that the defendant is a man of the highest character and that his reputation in the community is exemplary.

The evidence will further show that the defendant was on the date charged in the indictment the Manager of the Heights Art Theater.

The Heights Art Theater is situated at 2781 Euclid Heights Boulevard, in the City of Cleveland Heights, Ohio, and it seats approximately nine hundred people.

The theater is a first rate and first run motion picture theater.

The evidence will further show that the clientele of the Heights Art Theater consists of persons who, generally speaking, are in the middle and upper income classes.

Mr. Jacobellis, as manager of the Heights Art Theater, has consistently followed a policy of maintaining a first

[fol. 86] class theater, and has also developed a policy that where any of the films proposed to be exhibited at the theater are of a type which in his opinion, in the opinion of the public at large, or in the opinion of qualified motion picture critics, is perhaps too sophisticated for the juvenile mind, of prohibiting any minor under the age of eighteen years from attending the showing of such films, even to the extent of prohibiting their attendance when accompanied by parents or otherwise. This policy was followed with respect to the showing of "The Lovers" and no person under the age of eighteen years was admitted to the theater for the purpose of attending a showing of the film.

The Heights Art Theater has acquired a fine reputation not only in the City of Cleveland Heights where it is located, but in the County of Cuyahoga and its environs.

At no time during the operation of the Heights Art Theater under the management of Nico Jacobellis has there been any disturbance in the theater, nor has any film been seized nor any arrest made at the theater as a result of the showing of any film or other activity at the theater.

[fol. 87] The ownership of the theater follows the policy of showing at the Heights Art Theater those films which are considered to be of outstanding interest and impact, and during the time Mr. Jacobellis has managed the theater some of the outstanding films produced both in the United States and abroad have been exhibited at the theater.

If I may, I would like to read a partial list of the films which have been shown in the theater.

Mr. Osborne: Do you intend to put that into evidence?

Mr. Kleinman: Yes.

Gates of Paris,
Ordet,
My Uncle,
The Seventh Seal,
The Horse's Mouth,
Inspector Haigret,
He Who Must Die,
Pather Panchali,
Room At The Top,
Aparajto,

[fol. 88]

Wild Strawberries,
Albert Schweitzer,
The Mouse That Roared,
The Magician, and
Swan Lake.

The Heights Art Theater caters to a sophisticated audience and does not pander the tastes of thrill seekers. This is evidenced from the nature of the films which have been shown, some of which I have just referred to.

So far as the motion picture film itself is concerned, it was produced in France under the direction of Louis Malle, an outstanding French director. The female lead is played by Jeanne Moreau, probably the most outstanding French film actress.

The film is distributed nationally by Zenith International Pictures Corporation, a New York corporation, and the owners of the Heights Art Theater acquired the rights to exhibit this motion picture in their theaters.

The evidence will show that the film was examined by the Collector of Customs at the Port of New York, where the film was imported, and pursuant to the administrative [fol. 89] procedures established for said purpose, determined that the film was not obscene under the standards set forth in Section 1305 of the Tariff Act, and that the picture could be and was released for exhibition in the United States.

Prior to the exhibition of the film at the Heights Art Theater, the evidence will show that the film was being exhibited in a large number of cities throughout the entire United States, and, in fact, within the State of Ohio.

A partial list of some of these cities is:

Washington, D. C.,
Detroit, Michigan,
Louisville, Kentucky,
Memphis, Tennessee,
Oakland, California,
Westport, Connecticut,
Toledo, Ohio,
Columbus, Ohio,

Los Angeles, California,
New York, New York,
Stamford, Connecticut,
[fol. 90]
Boston, Massachusetts,
San Francisco, California,
New Orleans, Louisiana
Denver, Colorado,
Biloxi, Mississippi, and
Dallas, Texas.

The evidence will further show that although the film prior to the said date was exhibited in all of these cities, that not in a single instance was the showing stopped, the film seized, or any arrests made by reason of the showing of the film. The evidence will show that Nico Jacobellis was aware of the fact that the film was exhibited in these various cities.

The evidence will further show that on November 12, 1959, at approximately 7:15 o'clock P. M., the film "The Lovers" was shown at the Heights Art Theater. Captain Gordon of the Cleveland Heights detectives was present at the first showing of the film that evening. The film was also shown a second time during that evening.

The evidence will show that after observing the film Cap-
[fol. 91] tain Gordon made no comments relative to the film to Nico Jacobellis or anyone else associated with the Heights Art Theater, nor was any warning given as to the further showing of the film.

The following day, November 13th, the date set forth in the indictment, Captain Gordon again returned to the Heights Art Theater at approximately 6:30 P. M., in the company of other officials, all of whom observed the first showing of the film that evening.

After the film was shown, they left the theater, and none of the said persons made any statements or remarks to Nico Jacobellis or anyone else associated with the theater relative to the film. Approximately twenty minutes later, Captain Gordon returned with police officers of the Cleveland Heights Police Department, stopped the showing of the film, cleared the theater of the patrons, who numbered

approximately 400, seized the film, and arrested Nico Jacobellis.

At this time I should like to indicate that the evidence will show that from time to time the police department of [fol. 92] the City of Cleveland Heights through Captain Gordon has requested Nico Jacobellis that he permit them to view certain films, and Nico has consistently complied and cooperated with the Cleveland Heights Police Department.

The evidence will further show that at no time was Nico told that any film wasn't to be showed, or that he showed any film in violation of any order of the police department during the time that he was manager of this theater.

Strangely enough, in listening to the Prosecutor, I hardly recognize the film.

The evidence will show, and this Court will see the film, that the film is controversial in its nature, deals with the subject of adultery.

However, the evidence will further show that some of the outstanding recognized critics in the field of motion pictures reviewed the film in columns appearing in various newspapers in the United States and acclaimed the film as an outstanding work of art, well done, and in other similar terms. Except in rare circumstances, the critics were in [fol. 93] agreement that while the film dealt realistically with sex it was not obscene.

Mr. Osborne: I will object to that statement.

Judge McDermott: Go ahead.

Mr. Kleinman: The evidence will further show that Bosley Crowther, the movie critic of the New York Times, generally hailed as the dean of motion picture critics, and whose column appears in the New York Times, which has national circulation, chose the film as one of the ten best foreign films of the year 1959.

Hollis Alpert, the movie critic of the Saturday Review, chose the film as one of the ten outstanding films of that year, foreign and otherwise.

The evidence will show that Nico Jacobellis read the various reviews written by such outstanding critics and other information which was available to him with reference to this motion picture.

In addition to the critical acclaim awarded this film by the critics referred to, the film was also awarded the [fol. 94] "Silver Lion" award at the Venice International Film Festival in Venice, Italy.

The film was also awarded a prize for excellence by the French government. These facts also were known to Nico Jacobellis prior to the exhibition of the film on the date charged in the indictment.

The film which the Court will see and observe deals with the story of a French woman married to a moderately wealthy husband, and being the mother of a small child. The family resides in a quiet province in France. The husband is engaged in the publishing business, and his business occupies a great deal of his time, practically to the exclusion of any interest in his wife. This woman, a rather attractive woman, is bored with her empty existence and seeks love and affection.

As a result of this boredom, she makes frequent trips to Paris, France, where she visits a woman friend. During the course of these visits she becomes acquainted with an attractive suave polo player whom she sees rather frequently. Even this activity rather bores the star of the film.

[fol. 95] The husband suspects that the wife is seeing the polo player, and he asks his wife to invite her woman friend and the polo player to dinner at their home, which she does. On the day when the guests are to come to dinner, the woman on her way home, hoping to arrive there before her guests, suffers a breakdown of her automobile and waits at the side of the road. A young archeologist driving by offers to drive her to her home.

Judge McDermott: Polo player or archeologist?

Mr. Kleinman: First the polo player and now the archeologist.

Mr. Osborne: There are two of them, different men.

Judge McDermott: Proceed.

Mr. Kleinman: The archeologist, however, has certain errands to perform on the way, and the woman reaches home after her guests have already arrived. The husband thereupon also invites the archeologist to remain for dinner and overnight.

The dinner is a rather boring affair, and the husband [fol. 96] makes some fairly pointed remarks at his wife and her friend. After dinner, the parties retire to their rooms, but the archeologist remains in the living room of the home. He places a record upon the record player and then retires to his room. The wife prepares herself for bed, but, hearing the music in the living room, proceeds to the living room and turns off the record player, and pours herself a drink.

She then goes for a walk in the garden, and during the walk passes the portico of the bedroom of the archeologist who is out in the garden smoking a cigaret. She passes by and proceeds on her walk, and he proceeds to follow her. She continues, and he continues to follow her, during which the camera photographs some very outstanding scenery in a very artistic manner.

Mr. Osborne: Objection.

Judge McDermott: Yes; that will be for the Court to say.

Mr. Kleinman: Upon arriving at an old mill on the property, suddenly the two realize that there is some attraction between them. They thereupon return to the home [fol. 97] and proceed to the bedroom of the wife, where they make ardent love. The next morning, without a word to her husband or her friend, the wife packs her belongings and leaves her home and child with the archeologist. The film shows a portion of their travel and ends upon this note.

The evidence to be presented by the defendant will show that this film presents a sincere effort to depict a problem which is a part of human existence; that it is done in good taste and without any attempt or intent to arouse any prurient interests.

The photography is in many aspects outstanding and the film as a whole can be classified as a work of art.

The evidence will show that the so-called love scene was essential to create the necessary impact upon the audience for whom it was produced, and that, while realistic, has none of the aspects of pornography or obscenity.

The Supreme Court of the United States in the Roth case has stated that the determination of whether any mat- [fol. 98] ter is obscene is determined by whether to the

average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to the prurient interests.

It is obvious from this definition that the determination is not made by analysis of the effect upon any particular individual who may be engaged in the trial of this cause, but, rather, upon the average man based upon contemporary community standards.

Mr. Osborne: Objection on the argument.

Judge McDermott: Finish up about the evidence.

Mr. Kleinman: The evidence will show that the motion picture in issue does not exceed the tolerance of the contemporary community standards and that it is, in fact, in line with the development to more realistically present social problems to the public not only in motion pictures but also in the field of literature and other media.

The evidence will show that the community at large has accepted and is continuing to accept as proper such realism [fol. 99] as regards social matters, and that the general problem of sex is no longer taboo as a subject of public expression and discussion as is evidenced by the fact that sex is now being taught in many public schools, something unheard of not too many years ago.

We should like to make it clear that neither the defendant nor counsel for the defendant, nor, in fact, any of the witnesses for the defense, condone or approve of pornographic and obscene matter, but they and all of them consider that the issues here involved relative to freedom of speech are overriding factors and that this motion picture made in all sincerity, exhibited and advertised publicly, nationally and internationally acclaimed for its artistry and its beauty, is not obscene as determined under the standard for obscenity set forth by the United States Supreme Court.

We are confident that after examination of the film and the hearing of the testimony from the witness stand, this Court will reach a finding that the defendant, Nico Jaco- [fol. 100] bellis, is not guilty of the crime of which he is charged.

Judge McMahon: Off the record, John.

(Off the record conference held at this time.)

Mr. Osborne: It is stipulated by and between the State and the defendant that two metal containers marked State's Exhibit 1-A and State's Exhibit 1-B, containing five reels of motion picture film, three rolls in one and two in the other, that these containers contain the film named in the indictment, Les Amants, and in English, "The Lovers," and that this film represented by State's Exhibit 1-A and State's Exhibit 1-B is the film in issue in this case in both counts in the indictment.

Mr. Terrell: We join in this stipulation, your Honors.

Judge McDermott: The record may show that.

Mr. Osborne: And at this time it is stipulated by and between the State and the defendant that the film may be exhibited to the Court tomorrow morning, May 24, 1960, at 9:30 A. M., at the studios of the Twentieth Century Fox, [fol. 101] located at 2219 Payne Avenue, here in Cleveland, where the facilities exist for the projecting of such a film as this in issue.

Mr. Terrell: We join in such stipulation.

Judge McDermott: Let the record show that is the stipulation entered into by both parties, and that the request was made that showing be made at this location, and the request is granted.

That will be the first order of business.

Mr. Osborne: Yes, and it is further stipulated by and between the State and the defense that the projector provided by Twentieth Century Fox may project this film for the view of the judges tomorrow morning.

Judge McDermott: That request may be granted.

Mr. Osborne: May we at this time ask for a recess, your Honors.

Judge McDermott: This is a public showing, the Judges wanted to know.

[fol. 102] How many people can be seated there?

Mr. Osborne: 50 people, Judge, and it is our position that it is a public showing as it would be if it were in this courtroom at this time, and just the locale of the trial will change.

Judge McDermott: Court will be conducted there just the same as conducted here, and a couple of deputies and bailiffs should be present.

Mr. Terrell: May we have a couple of rows reserved for the participants in this trial, and then whatever room is left over can be for the accomodation of the public, your Honors.

Judge McDermott: Yes.

(At this time, Court was adjourned until 9:15 A. M. tomorrow morning, May 24, 1960.)

[fol. 103] Reporter's Certificate to foregoing transcript (omitted in printing).

* * * * * * *

[fol. 105]

Tuesday morning, May 24, 1960, at 10:14 A. M.

Judge McDermott: We will proceed to 2219 Payne Avenue for the viewing of the film at the Twentieth Century-Fox Film studios, gentlemen.

OFFERS IN EVIDENCE

Mr. Osborne: Judge, at this time, may we offer into evidence State's Exhibits 1-A and 1-B.

Judge McDermott: Those are the two containers with the film.

Mr. Osborne: Yes, and we want to offer them at this time for the record, if the Court please.

Judge Pincura: There is no objection to State's Exhibits 1-A and 1-B?

Mr. Kleinman: No, sir.

Judge McDermott: Those may be admitted for the record.

Mr. Osborne: Thank you.

COLLOQUY BETWEEN COURT AND COUNSEL

Judge McDermott: At the request of the State, and with the consent of the defendant, we will adjourn further hearing of this case to 2219 Payne Avenue, and then after [fol. 106] we have viewed the movie, The Lovers, we will resume our deliberations here, and let the record show that, John.

Court Reporter: Yes, sir.

Mr. Kleinman: Do I understand that we will return to the courtroom after the showing of the film?

Mr. Terrell: May I say this, that we will be close to the lunch hour, and the Court can reconvene at 1:30 or 1:45, and we will all have our lunch after the viewing of the film.

Mr. Osborne: Question of terminology. We will be taking evidence at 2219 Payne Avenue, and we would ask that the Court not adjourn at this time and just change the locale of the trial to 2219 Payne Avenue, if the Court please.

Judge McMahon: There will be evidence taken there?

Mr. Osborne: Yes, and that will be evidence.

Captain Gordon will be in charge of exhibiting the film.

May we have as an aide to Captain Gordon John Gal-
[fol. 107] lagher?

Mr. Terrell: I think the defense should have somebody to go along with the film, and we would like to appoint Sam Lerner to go along.

Judge McDermott: All right; both requests are granted, and we will now go over to Payne Avenue for the viewing of the film, The Lovers.

(At this time, the Court was convened to Payne Avenue, 2219 Payne Avenue, at the studios of the Twentieth Century-Fox Film Corporation.)

Judge McDermott: We have been in recess, and we are going to reopen court for the continuance of the hearing, and we have been in recess.

Gentlemen, and I am speaking to the photographers now, there are to be no more pictures.

Reopen court.

(Court was reopened at this time by the bailiff.)

Judge McDermott: I would like to say further now that this thing should be done in an orderly fashion, and let
[fol. 108] there be no remarks, please, and the Court requests that respectfully of the spectators because the Court consisting of three judges will have to pass on this thing in evidence, and the Court will appreciate your cooperation, ladies and gentlemen.

(At the hour of 10:35 A. M., May 24, 1960, the movie, The Lovers, was exhibited on the screen.)

Judge McDermott: Have the record show, Mr. Sato, that the defendant, Mr. Jacobellis, was present during the showing of the film, The Lovers, while court is in session.

(At this time, 12:15 P. M., May 24, 1960, the movie, The Lovers, the exhibition thereof, was completed.)

Judge McDermott: It is now 12:15 P. M. Mr. Bailiff, will you adjourn court at this time until 1:45 P. M., at which time we will meet in Room No. 3, at the Criminal Courts Building.

(At this time, the bailiff adjourned court until 1:45 P. M.)

[fol. 109] Tuesday afternoon, May 24, 1960, at 1:45 P. M.

(At this time court was reopened at the Cuyahoga County Criminal Courts Building, in Room No. 3.)

Judge McDermott: Gentlemen, we will go until 3:00 P. M. today because Judge Pincura has court duties in Lorain, and we will adjourn at 3:00 P. M. today so that he can fulfill his obligations.

Tomorrow we will be in session from 9:15 to 12:00, and from 1:30 to 4:15, and that will be the schedule every day until we get through; and so that you will understand about today, gentlemen.

Mr. Osborne: We would like to wait a moment until Bernard Stuplinksi comes in, your Honor.

Mr. Kleinman: We are waiting for Mr. Terrell, too.

(Short wait at this time until the foregoing gentlemen came into the courtroom.)

[fol. 110] Judge McDermott: Gentlemen, are you ready?

Mr. Stuplinski: For our first witness we will call Miss Eleanore Hartman.

Judge McDermott: Have her stand, and swear her in.

(Bailiff swears in the witness at this time.)

Mr. Stuplinski: I would like to inform the Court and the attorneys for the defense that at this time there are one or two other people that will testify concerning certain periodicals, like Miss Hartman, and they will just testify

that these are periodicals that they have in their custody. Do you want them out?

Mr. Terrell: We will waive as to these particular witnesses.

Judge McDermott: Who will they be, Mr. Stuplinski?

Mr. Stuplinski: This lady, and Robert Noyes from the Cleveland Press, and Mr. Rowe from the—Edgar Rowe from the Cleveland Plain Dealer.

Judge McDermott: Exceptions will be granted by agree-
[fol. 111] ment as to these three witnesses only.

Mr. Terrell: If the Court please, we have a man who will testify, and he is one of the owners of the theater from Chicago, and I don't think that anything that will take place—

Judge McDermott: You said he would not be called as a witness, and you said that in open court here yesterday.

Mr. Terrell: This is another one.

Judge McMahon: There is a motion.

Judge McDermott: What is his name, this witness?

Mr. Terrell: Edward Schuman.

Mr. Osborne: If it please the Court, the witnesses we expect to present within the next few minutes speak only in a representative capacity from the Cleveland Public Library and the Cleveland Press and News, and the Cleveland Plain Dealer; and it has been indicated that the gentleman from Chicago, Illinois, speaks as one of the owners.

Mr. Terrell: That is right, Mr. Osborne.

[fol. 112] Mr. Osborne: We would have no objection to his being present during the testimony of these representatives of the Cleveland Press and Cleveland News, and the Cleveland Plain Dealer, and the Cleveland Public Library also.

Judge McDermott: Let the record show that, and now let us proceed with the witness, gentlemen.

. . . . . .

[fol. 170] May 25, 1960

Thereupon, the State, in order to further maintain the issues on its part to be maintained, called as a witness CAPTAIN EARL GORDON, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Captain Earl Gordon.

By Mr. Stuplinski:

Q. Will you state your name for the record?

A. Earl J. Gordon.

Q. And where do you live, sir?

A. 4293 Elmwood Road, South Euclid, Ohio.

Q. And where are you employed?

A. For the City of Cleveland Heights, Ohio, in the police department.

Q. I see.

And how long have you been with the Cleveland Heights Police Department?

A. Approximately 14 years.

Q. Do you have any rank in the police department, Captain?

A. Yes, Captain of Detectives.

Q. Are you then in charge of the Detective Bureau of [fol. 171] the Cleveland Heights police?

A. Yes, sir.

Q. How long have you been Captain?

A. Approximately four years.

Q. How long have you been with the Detective Bureau in Cleveland Heights?

A. Approximately 13 years.

Q. I see.

And is Sergeant Michael Cannon one of your subordinates in that department?

A. Yes, sir.

Q. Now, in your official capacity, Captain Gordon, as a member of the Cleveland Heights Police Department, can you tell us if you ever had occasion to go to the Heights Art Theater on Euclid Heights Boulevard?

A. Yes, sir.

Q. And will you tell us when was the first time that you went to the Heights Art Theater, Captain Gordon?

A. Approximately three to four years ago.

Q. By the way, do you know from your own knowledge how long the Cleveland Heights Art Theater has been in operation?

A. From visual observation, marquee and advertise-[fol. 172] ments, I would say since 1955, or thereabouts.

Q. I see.

And can you place the time of your first visit to the Heights Art Theater more definitely?

A. Not definitely, sir.

Q. Well, approximately?

A. Approximately three to four years was my first visit, but I am not sure.

Q. From now?

A. Yes, from now.

Q. That would be maybe—three to four—about '56 or '57?

A. That is correct.

Q. Do you know Nico Jacobellis?

A. Yes, sir.

Q. And how long have you known Nico Jacobellis, Captain?

A. Approximately three to four years since our first conversation.

Q. Where was the first time that you saw Mr. Jacobellis?

A. In the office of the theater located at 2781 Euclid Heights Boulevard, Cleveland Heights, Ohio.

Q. Now, you mentioned that the first time that you visited [fol. 173] the theater was three to four years ago, Captain?

A. Yes.

Q. When you first visited the theater, did you have occasion to see Mr. Jacobellis?

A. Yes, sir.

Q. Now, Captain Gordon, will you tell us if that first time that you saw Mr. Jacobellis, if you had any conversation with him?

A. Yes, sir; I did.

Q. Was anyone present when you had that conversation, Captain?

A. No, sir.

Q. Will you tell us where the conversation took place?

A. It took place in the office adjacent to the lobby of the theater, on the first floor.

Q. All right.

Will you tell us what you said and what Mr. Jacobellis said, if anything?

Mr. Terrell: Objection.

Mr. Kleinman: Objection.

Judge McDermott: Captain Gordon and the defendant were there alone together at that time?

[fol. 174] Mr. Kleinman: That was three to four years ago, and it was three to four years ago before this indictment, and we would like to know what relevancy this has to the matter in hand.

Judge McDermott: You expect to tie this in later, Mr. Prosecutor?

Mr. Stuplinski: Yes, we will tie this in.

Mr. McDermott: Overrule the objection.

Mr. Kleinman: Exception.

Mr. Terrell: For the record.

Judge McDermott: The record may show your exception.

Pin that time as exactly as you can and as near as possible to the period involved.

Q. You said three to four years ago?

Judge McDermott: Month.

Q. Tell us as best you can the time and the year.

A. As I recall, it was in September.

Q. Of what year?

A. 1957.

Q. Tell us the conversation that took place, Captain Gordon?

Mr. Kleinman: Objection.

[fol. 175] Judge McDermott: Overruled on the same score.

The Witness: Shall I answer?

Judge McDermott: Yes.

A. I introduced myself to Mr. Jacobellis, and I told him that I was Captain Gordon from the police department of Cleveland Heights, and asked him if he was the manager of the theater, and he said that he was, and he told me his name was Nico Jacobellis.

I told him that I was there in behalf of the Chief of Police, Edward Gaffney, and we were concerned with recent reviews in the newspapers concerning pictures that he intended to show in the theater in the near future, and I asked him if the type of pictures that he intended to show was of the same quality as presently shown at the Lower Mall Theater, and Mr. Jacobellis stated that it wasn't, and he did not intend to show that type, and that the pictures that he intended to show were of a high class type and consisted mostly of foreign import which he had personally reviewed—and he had personally reviewed many of them on a recent trip in Europe.

Q. You did make some mention of a theater that took place during this conversation. Was that the Lower Mall Theater?

[fol. 176] A. Yes.

Q. And where is that located?

A. Located at—apparently East 3rd Street and Superior, Cleveland, by the square.

Judge McDermott: The Court will take notice of where it is downtown.

Q. All right.

Continue, Captain.

A. Mr. Jacobellis went on to say that he had personally reviewed a great many of the pictures that he had intended to show in the near future, and that he was intending to personally review all of the pictures that would be shown at the Heights Art Theater before they are shown, and that on his own decision he had omitted or deleted parts of the whole picture that he thought would be unfavorable, and I told him that I was pleased to hear that.

Mr. Stuplinski: Captain, slow down a little bit in your narration, please.

The Witness: Yes.

Q. Continue.

A. I told him I was pleased to hear this, and I wanted to remind him of his and our responsibility in the matter, and that I felt that it was his responsibility to review his pictures and see that what he showed was wholesome and [fol. 177] not in violation of the obscenity statutes, and, of course, it was our responsibility to take an interest in the event that these obscenity statutes had been violated, and he stated that he did intend to show pictures that would cater to the adult trade, and he hoped in so doing to get a high class clientele at the theater.

I recall asking him that in view of the fact that he was going to continue to show adult type pictures that it was the chief of police request that he place an "adults only" sign in the theater, either on the marquee or in the theater booth, and Mr. Jacobellis stated to me that would not be desirable because that would bring in undesirables into the neighborhood, and he would limit the age to eighteen.

We also had some conversation concerning the fact that if it was necessary—if there was a need for police assistance not to hesitate to call us, and we would send a car there and cooperate with him at all times in any manner.

Q. What was meant by "police assistance"?

Mr. Kleinman: Objection.

Judge McDermott: Sustained, and that speaks for itself, I should think. We realize full well what he means by that remark.

[fol. 178] Q. Was that the extent of the conversation there on your first visit to the Heights Art Theater?

A. Yes, sir.

Q. Now, Captain Gordon, how long have you lived in Cleveland, or, rather, in the Cleveland area?

A. 36 years.

Q. All right.

Is that all your life, I take it?

A. Yes, sir.

Q. You had some reference in this conversation with Mr. Jacobellis about the Lower Mall Theater, did you, Captain?

A. Yes, sir.

Q. Can you tell us what kind of a movie—type of movies that were showing at the Lower Mall Theater when you made this reference to Mr. Jacobellis?

Mr. Kleinman: Objection.

Judge McDermott: Objection is sustained.

Q. In your official capacity as a police officer of the City of Cleveland Heights, did you have an opinion at that time as to the reputation of the Lower Mall Theater for displaying certain kind of movies?

Mr. Kleinman: Objection.

Judge McDermott: Sustained on the same theory.

[fol. 179] Q. From your observation, sir, as a citizen of your community and in your official capacity as a police officer, can you tell this Court what kind of a theater was the Lower Mall Theater, art theater or neighborhood theater, or what kind?

Mr. Kleinman: Objection.

Judge McDermott: Sustained, and that question is not here, gentlemen.

Q. Now, I think that you said that on your first visit to the Heights Art Theater in September, 1957, that you—

A. I would like to qualify that, and this was the first time that I met the defendant and had any conversation with him.

Q. Was it the Heights Art Theater before?

A. No, sir; called the Heights Theater.

Q. What kind of movies were shown then?

A. Neighborhood theater, originally.

Q. Then, I take it that this was—then I take it, Captain Gordon, that this was your first visit to the theater after it had been renamed the Heights Art Theater?

A. Yes.

Q. All right.

[fol. 180] Q. Tell us if you visited the theater after that first time?

A. Yes, sir; I did.

Q. There was a second time?

A. Yes.

Q. When was that?

A. October 2, 1957, our department records show that date.

Q. October 2nd?

A. October 2, 1957.

Q. So that would be several weeks or a month after your first visit.

Is that correct?

A. Yes, sir.

Q. Did you go to the Heights Art Theater in your official capacity?

A. Yes, sir; I did.

Q. Was this of your own volition or was this an office assignment?

A. An office assignment.

Q. Who made the assignment?

A. Chief of Police Edward Gaffney.

Q. All right.

This was on October 2, '57?

A. Yes.

[fol. 181] Q. Will you tell us, sir, who you saw when you went to the theater on that day?

A. There was, as I recall, a cleaning person in the theater, and it was in the afternoon, and I saw the defendant in the lobby and in his office.

Q. Mr. Jacobellis?

A. Mr. Jacobellis.

Q. All right.

Will you tell us what took place on your second visit to the theater?

Mr. Kleinman: Objection.

Judge McDermott: Objection is sustained, and that is pretty broad.

Q. Will you tell us if you had any conversation with Mr. Jacobellis on that second visit, Captain Gordon?

Mr. Kleinman: Objection.

Judge McDermott: Overruled on the same theory that you will connect this up later.

Mr. Stuplinski: We will do that, yes.

Judge McDermott: You say that you will connect this up later?

Mr. Stuplinski: Yes.

[fol. 182] Judge McDermott: Proceed, Mr. Prosecutor.

Q. Will you answer the question?

A. Yes, sir; I did have a conversation with the defendant.

Q. And who was present when the conversation took place?

Mr. Kleinman: Objection.

Judge McDermott: Objection overruled.

A. Defendant, and the two of us.

Mr. Stuplinski: Keep your voice up, Captain.

A. Defendant and myself.

Q. Tell us what conversation was held at that time, Captain Gordon.

Mr. Kleinman: Objection.

Judge McDermott: Overruled.

Mr. Kleinman: May we have a general objection?

Judge McDermott: Yes, you may, and –

Mr. Kleinman: May we have a continuing objection to this line of questioning, your Honor?

[fol. 183] Judge McDermott: Yes, you may have a continuing objection to this line of testimony.

Q. Captain, you may answer, and will you please tell us what the conversation was?

A. I told Mr. Jacobellis I was again there at the theater on an inquiry assignment from the Chief of Police, and that the Chief and myself both received complaints from people living in the neighborhood of the theater concerning the type of advertisements presently displayed in the showcases of the theater, and I told him that on the way into the theater that I had noticed one which consisted of a bedroom scene and a partially naked woman, and I asked him if it would be possible to eliminate this sort of advertisement in the showcases, and Mr. Jacobellis stated that, of course, he could not control the type of advertisements sent to him by the movie distributors, but he would place the worst ones in the lobby showcases, so that they would not be so readily seen by people on the sidewalk.

I might add at this time that the theater has showcases facing the sidewalk and showcases inside the lobby.

I told him I hoped that would help, and I renewed the [fol. 184] request and emphasized that it was the Chief of Police request that an "adults only" sign be placed on the marquee, and Mr. Jacobellis still thought that it would bring in undesirables into the neighborhood if he would do that, and that many of his pictures he did not feel were objectionable to teenagers.

In fact, he told me that he was making a special student admission price for a picture to be shown that weekend, and, as I recall, it was a historical picture, but I don't recall the title, and he for that reason would not like to advertise that it was an "adults only" show.

Q. Did you have occasion to visit the theater sometime after that, Captain Gordon, after the second visit?

A. Yes, sir. Made a visit there after that time.

Q. Will you tell us the approximate date of that visit, or the exact date, if you know?

Judge McDermott: Mr. Prosecutor, are there any other witnesses in the courtroom? I see some officers here that are welcome, but we do have an order of separation.

Mr. Osborne: They are not our witnesses.

Judge McDermott: Any defense witnesses?

[fol. 185] Mr. Kleinman: No.

Judge McDermott: I don't mean to be rude, but we do have an order for this separation of witnesses. Excuse me, and go ahead now.

Q. I don't believe that you answered my question about the date of the third visit, Captain Gordon.

A. As I recall; it was in November.

Q. November of 1957?

A. 1957.

Q. May I ask the occasion for that visit, Captain Gordon?

A. I went to the theater on invitation from Mr. Jacobellis.

Q. He called, did he?

A. I had called him the day before.

Q. I see.

Mr. Kleinman: Objection. If the Court please, if our general objection may apply to this general transaction as well, for the record.

Judge McDermott: Yes, but I don't think that there was any harm done, and he called the businessman, and that is [fol. 186] understandable.

Mr. Kleinman: The question is the relevancy of that testimony, your Honor.

Judge McDermott: On the same theory, that the prosecution will connect this up, we will allow that.

However, you may have your exception, Mr. Kleinman.

Q. Mr. Jacobellis called you the previous day, Captain Gordon?

A. I had called him.

Q. And what was the subject matter?

A. I telephoned him at his office and asked him if it would be possible to have a preview of a picture that he intended to show, and that the Chief of Police and I had read reviews of entitled, "And God Created Woman," and Mr. Jacobellis stated that it was difficult to have a projectionist on such short notice available, but he called us on the following day and made this arrangement.

Q. Did you go to the theater?

A. Yes.

Q. Did you discuss the movie, "And God Created Woman," with Mr. Jacobellis?

A. Yes, sir, a day or two after that, and Mr. Jacobellis [fol. 187] called me at the office.

Q. Did you discuss the movie, Captain Gordon, at that time?

A. Yes, sir.

Q. All right.

Now, sir, calling your attention to the latter part of the year, 1959, did you have any conversation with the defendant, Nico Jacobellis, at that time, Captain Gordon?

A. Yes, sir.

Q. Will you tell us when, the date of that conversation?

A. Approximately 3:00 to 3:30 P. M. on November 12th.

Q. And was this in person, this conversation, Captain Gordon?

A. No, sir, it is by telephone.

Judge McDermott: What year is this now?

Mr. Stuplinski: 1959.

Judge McDermott: All right.

Q. And did you call Mr. Jacobellis, or did he call you?
A. I called him.
Q. All right.
[fol. 188] Will you tell us what the conversation was at that time over the telephone?

Mr. Terrell: Same objection, if the Court please.
Judge McDermott: Overruled on the same basis.
Mr. Terrell: Exception.
Judge McDermott: You may have your exception with respect to this visit and this particular conversation.
Mr. Stuplinski: Your Honor, I will withdraw that question.
Judge McDermott: All right; that is withdrawn.

Q. Before calling Mr. Jacobellis on November 12, 1959, did you have a conversation with your Chief of Police? Chief Gaffney?
A. Yes, sir; I did.
Q. As a result of that conversation, did you make a telephone call to Mr. Jacobellis?
A. Yes, sir; I did.
Q. I take it that Mr. Jacobellis wasn't present when you spoke to Chief Gaffney?
A. That is correct.
Q. So that you can't tell us the conversation that took [fol. 189] place, but will you tell us anything other that took place, other than the conversation between you and Chief Gaffney?
A. Chief Gaffney showed me the morning Plain Dealer, and pointed to a specific article in the paper which I read.
Q. And do you remember the subject matter of that article?
A. Yes, sir; I do.
Q. What was it; will you tell us?
A. Advertisement.
Q. It was an advertisement?
A. Yes, sir.
Q. What did it advertise?
A. Advertised the picture to be shown that evening at the Heights Art Theater.
Q. Now, Captain Gordon, handing you what has been

marked for purposes of identification as State's Exhibit 7 and 7-A, which has been identified as Cleveland Plain Dealer, Greater Cleveland Final, Thursday morning, November 12, '59; is that correct?

A. Yes, sir.

Q. Pointing specifically to State's Exhibit 7-A, can you tell us if you have seen that page before?

A. Yes, sir.

[fol. 190] Q. And will you tell us, if you can, the specific advertisement that was pointed out to you by Chief Gaffney?

A. The advertisement showed the Heights Art Theater advertising a picture called "The Lovers" and states on the picture—

Mr. Terrell: Now, wait a minute, and I object.

Judge McDermott: Yes, disregard what the Captain states it says.

Mr. Stuplinski: He did not say that, your Honor.

Judge McDermott: I am striking from the record "and states on the picture," and that is what they are objecting to. That is stricken out of the record.

It has been otherwise identified, and that former part may stand.

Q. All right.

And you say that you called Nick Jacobellis after that?

A. Yes, sir.

Q. Tell us what conversation was with Mr. Jacobellis, Captain?

A. I told Mr. Jacobellis I was calling in reference to the advertisement concerning the picture that he intended to [fol. 191] show that evening at the Heights Art Theater entitled, "The Lovers," and I asked him if he intended to show that, and he said, "Yes, I do."

I then asked him if he had seen the picture, and he said:

"I have seen it on two occasions."

I said:

"Is there anything in this picture that you think is wrong, illegal?"

He said:

"No, and I think it is a beautifully done picture, and in good taste."

I said:

"What is this picture about?"

He said:

"It is about a young couple living outside of Paris who had domestic problems, and the wife made frequent trips to Paris, and in so doing kept company with other men; and while returning from one of the trips to Paris she met a young archeologist after having motor trouble on the highway, and he drove her home, and he is invited to remain by her husband as an overnight guest, and the picture is climaxed when the two meet in the gardens and have a very tender love scene."

[fol. 192] He said:

"I think the whole picture is beautifully done."

He repeated the words "beautifully done," I recall, and he could not see anything wrong with the picture.

I asked him if we could have a preview of the picture before he had a public showing, and he said, no, and it was too late to get a projectionist, and then he said to me:

"Why don't you come down and see the picture yourself?"

I told him I intended to do so, and asked him what time the first showing went on, and he told me, and I told him to expect me there.

Q. Is that the extent of your conversation over the telephone with Mr. Jacobellis?

A. Yes, sir; as near as I can recall now.

Q. Now, Captain Gordon, you just related a conversation between yourself and Mr. Jacobellis over the telephone?

A. Yes.

Q. I think that you said that took place after you talked to Chief Gaffney; this telephone call that you made to Mr. Jacobellis, was that an assignment by the Chief, or on your own volition?

A. That was an assignment by the Chief of Police, [fol. 193] Edward Gaffney.

Q. This was on November 12, '59, that you say Mr. Jacobellis called you—rather, when he told you to come down and see the movie?

A. Yes.

Q. Did you go down to the Heights Art Theater sometime after that?

A. Yes, sir.

Q. Will you tell us when you went there, and the date and the time, if you can?

A. Little after 7:00 P. M., on November 12th, the day that I telephoned him.

Q. Were you alone or in the company of other people at that time?

A. I was alone at the time; officially, alone.

Q. Will you tell us—you went there in your official capacity or not?

A. Yes, sir, in my official capacity.

Q. I see.

Tell us what you did there at the Heights Art Theater?

A. As I approached the theater I observed the ticket booth open, and selling tickets to patrons. The marquee advertised the picture.

Q. What picture?

[fol. 194] A. "The Lovers," the picture in question.

Q. Proceed, Captain.

A. As I entered the theater I looked about for Mr. Jacobellis and observed him talking to another man near the office, of the lobby, as I passed it, and I turned and went into the seating section of the theater.

I observed 200 or 300 people sitting, and I watched the complete film, "The Lovers."

Q. The film was showing on the screen when you went there that evening?

A. A cartoon was showing at the time that I entered, as I recall.

Q. And during the course of your visit there that evening, did you see the motion picture, "The Lovers"?

A. Yes, sir.

Q. And these people that you mention that were seated in the theater, can you describe what they were doing?

A. They were watching the film, as I was.

Q. Were they sitting there while "The Lovers" came on the screen?

A. Yes, sir.

Q. All right.

What else did you do there, Captain Gordon, if anything?

[fol. 195] A. After viewing the picture, I left the theater and returned to the police department, and made my reports, and then went home.

Q. All right.

Now, did you work the following day, on November 13, 1959?

A. Yes, sir.

Q. And will you tell us whether or not you had any conversation relative to that motion picture with Chief Gaffney, on November 13, 1959?

A. Yes, sir; I did.

Q. Tell us whether or not you spoke to anyone else about that motion picture in your official capacity, Captain?

A. Yes, sir.

Q. Whom did you talk to?

A. King Wilnot, our city law director, and John T. Corrigan, Cuyahoga County Prosecutor.

Q. I see.

And now, did you have occasion to return to the Heights Art Theater sometime after November 12, 1959, Captain Gordon?

A. Yes, sir; I did.

Q. Tell us when that was, Captain Gordon?

A. It was for the first showing of the picture on Novem-

[fol. 196] ber 13th, approximately 6:45 P. M., I returned to the theater.

Q. Did you go to the theater alone?

A. I was accompanied with other people at that time.

Q. Who?

A. County Prosecutor John T. Corrigan, City Law Director King Wilmot.

Q. Three of you?

A. Three of us.

Q. What happened, and what took place? Will you tell us that, Captain Gordon?

A. We entered the theater and observed the theater in operation, with the ticket booth open, and approximately 350 patrons sitting in the theater seating section, and we watched the film, "The Lovers," entitled, "The Lovers."

Q. By the way—this going to the theater that evening with John Corrigan, County Prosecutor, and King Wilmot, Law Director of the City of Cleveland Heights, was that by accident or pre-arrangement?

A. Pre-arrangement.

Q. Where did you meet?

A. Detective Bureau, Cleveland Heights Police Station.

[fol. 197] Q. Will you tell us, was there a motion picture being projected on the screen when you arrived at the theater?

A. Yes, sir.

Q. Will you tell us what motion picture was being projected at that time?

A. It was a cartoon.

Q. Cartoon?

A. Yes.

Q. Is that the only thing that was—that you saw there during the course of the evening?

A. There was previews and cartoon, and the main feature.

Q. What was the main feature?

A. Main feature was entitled, "The Lovers."

Q. And did you view the film in its entirety from beginning to end?

A. Yes, sir.

Q. November 13th?

A. Yes, sir.

Q. In company, I take it, with Mr. Corrigan and Mr. Wilmot?

A. Yes, sir.

Q. Will you tell us what took place after you saw the motion picture, "The Lovers," on the 13th of November,

[fol. 198] 1959?

A. We three returned to the detective bureau at Cleveland Heights, and we had a conference.

Mr. Terrell: May we have the time that they came to the show and the time that they returned and went back to the detective bureau?

Q. Tell us, if you can, Captain, what time did you arrive at the detective bureau after you had seen the movie?

Mr. Osborne: Your Honor, there will be plenty of opportunity for cross-examination with reference to these matters at a later time.

Judge McDermott: Yes, but we are losing time, and we can get rid of it right now, and the Captain can say.

Mr. Terrell: Thank you very much.

A. Shortly after 8:00 P. M. that we returned to the detective bureau, and take a few moments to get from the Heights Art Theater to city hall.

Q. All right.

You say that there was a conference at the detective bureau in Cleveland Heights after the movie was viewed? [fol. 199] A. Yes.

Q. And who were involved in the conference, Captain Gordon?

A. County of Cuyahoga Prosecutor, John T. Corrigan; King Wilmot, City Law Director of Cleveland Heights.

Q. Tell us, were you in on that conference, Captain Gordon?

A. And myself; yes, sir.

Q. Now, what—tell us what you did after the conference?

A. I summoned Sergeant Cannon, Detective Previte, and Lieutenant Frank Wilford of the uniformed division.

Q. Does Cleveland Heights have a city prosecutor?

A. Yes.

Q. What is his name?

A. Robert Grogan.

Q. Was he present in any of these then?

A. Mr. Grogan was there for a very short time.

Q. Where?

A. In the detective bureau.

Q. Will you tell us what took place after the conference, Captain Gordon?

A. In company with Sergeant Cannon, Detective Peter Previte, we returned to the Heights Art Theater.

[fol. 200] Mr. Terrell: May we have the time that they returned?

Mr. Osborne: I will object, your Honor.

Judge McDermott: Let the Captain give that, if you know, Captain, about the time that you returned back to the theater.

Q. Do you know what time you returned to the theater, Captain?

A. I would guess 8:15, or thereabouts—between eight and eight-thirty, to be exact.

Q. Now, you said that you were guessing. Do you recall approximately the time that it was?

A. Approximately that was the time.

Q. Tell us what you did at the theater the second time?

A. Entered the theater through the main lobby with Sergeant Cannon and Detective Previte, and inquired where Mr. Jacobellis was, and observed the theater filled with approximately 300 people in the seating capacity of the theater, and passed through the lobby to the staircase leading to the second floor landing of the balcony, accompanied with Sergeant Cannon and Detective Previte, and walked up to Mr. Jacobellis, who was seated at a desk, and had conversation with Mr. Jacobellis.

[fol. 201] Q. Was there a movie in progress at that time?

A. Yes.

Q. What was the movie in progress?

A. "The Lovers" was in progress.

Q. All right.

And then you say that you met Mr. Jacobellis?

A. Yes.

Q. Will you tell us what took place at that time, Captain Gordon?

This was on the balcony?

A. Lobby.

Q. All right.

A. I walked up to his desk and informed him that the picture had just been viewed by the County Prosecutor

of Cuyahoga County, John T. Corrigan, and our City Law Director, King Wilmot, and myself, and we had concluded that it was in violation of the State of Ohio obscenity statute, and that we would stop the showing of that picture and confiscate the film, and place him under arrest.

I asked him if we might have his cooperation in informing the patrons to avoid rowdiness, and Mr. Jacobellis said: "Yes, of course."

[fol. 202] A. Do you want me to continue?

Q. Yes, continue with this series of events, if you will.

A. I instructed Detective Previte to go back through the lobby, and Mr. Jacobellis and myself and Sergeant Cannon proceeded to the staircase, to the balcony, and up to the projection room, which is about 30 to 40 feet from his desk.

The three of us walked into the projection room, and Mr. Jacobellis told the projectionist that the Heights police are here and want to stop the film, and the projectionist answered O. K.

I instructed Sergeant Cannon to remain in the projection room and confiscate the film.

Mr. Jacobellis and I went back out of the projection room downstairs onto the first floor landing; and as we passed into the seating capacity of the theater Mr. Jacobellis said to someone, I believe the—I am not sure who he was, but at any rate he said that he should call some party in Columbus and tell them what had happened.

Then Mr. Jacobellis and I walked onto the seating section of the theater out into the aisle, and Mr. Jacobellis turned and faced the patrons, and called for the house lights to be turned on; and he made an announcement to [fol. 203] the public that the Heights police have just stopped showing the film, and if they would form an orderly line to the ticket booth and refrain from smoking, that he would give them back the full purchase price of the ticket.

Mr. Jacobellis and I walked back into the lobby where I gave instructions to Lieutenant Wilford, and a cruiser responded, a uniformed cruiser, and conveyed Mr. Jacobellis to the police station, and I returned.

Q. Lieutenant Wilford, where did he come from?

A. Lieutenant Frank Wilford went to the theater in

his own uniformed car at the same time that Detective Sergeant Cannon and Detective Previte and I went to the theater in the detective cruiser.

Q. Did he then enter the theater at the same time?

A. Yes, and he remained in the lobby.

Q. All right.

A. I returned to the projection booth as Sergeant Cannon and the projectionist were placing the reels of film in two containers, three reels in the one container, and two reels in the other container.

I assisted Sergeant Cannon in carrying the film out of the theater and placed that in the detective cruiser, and returned to the station.

Q. What has been marked for purposes of identification as State's Exhibit 1-A and 1-B, is that the film that has been [fol. 204] taken from the theater?

A. Yes, sir; it is.

Mr. Stuplinski: If the Court please, may we have a short recess at this time?

Judge McDermott: You are not through yet?

Mr. Stuplinski: No.

Judge McDermott: We will take a short recess, and we will resume at 10:45, gentlemen.

Is that all right, gentlemen?

Mr. Terrell: Yes.

Judge McDermott: 10:45, then, gentlemen.

(At this time a short recess was held for ten minutes.)

[fol. 205] Wednesday morning, May 25, 1960, at 10:45 A. M.

Judge McDermott: All right, gentlemen, Ready to begin? Proceed with your examination of Captain Gordon.

By Mr. Stuplinski:

Q. Captain Gordon, I believe that you got to the point in your testimony where the movie was confiscated and the patrons were advised of the refund that they could get, and I think that you arrested Mr. Jacobellis you told us?

A. Yes.

Q. And what happened after you made the arrest?

A. Mr. Jacobellis was conveyed to the Detective Bureau of the Cleveland Heights Police Department by members of the uniform division.

As I stated, I went back to the projection booth and helped Sergeant Cannon remove the film, and Sergeant Cannon and myself and Detective Previte returned to the station.

Q. Mr. Jacobellis was in your company then when you returned to the station?

[fol. 206] A. When we returned to the station I saw him being fingerprinted.

Q. Fingerprinted?

A. Yes.

Q. Did you have any further conversation with Mr. Jacobellis at the Cleveland Heights Police Department, Captain?

A. Yes, sir.

Q. Who was present?

A. Sergeant Cannon and Detective Previte; and Jacobellis asked if he could use the telephone, and I told him that he might.

Q. Did he use the telephone?

A. I don't know, and a few minutes later I met Mr. Kleinman.

Q. Mr. Kleinman?

A. Yes.

Q. Which Mr. Kleinman is that?

A. The defense attorney.

Q. Bennet Kleinman?

A. Yes.

Q. He arrived at the Cleveland Heights Police Department Station?

A. Yes.

Q. And in the presence of Mr. Jacobellis did you have any [fol. 207] conversation with Mr. Jacobellis or with Mr. Kleinman?

A. Yes.

Q. Tell us about that conversation?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Why?

Mr. Kleinman: He said either myself or Jacobellis, and I assume that Jacobellis should be present if he will relate that conversation.

Q. Did you have conversation with Mr. Kleinman in Mr. Jacobellis' presence?

A. Yes.

Q. What was the conversation?

A. Mr. Kleinman asked me what Mr. Jacobellis was being charged with, and I informed him he was being charged with violation of the State of Ohio obscenity laws, 2905.34. and Mr. Kleinman said:

"This is censorship, and we are going to fight."

He refused to discuss the matter any further and added that he would be released shortly on personal bond.

Q. And was he so released?

[fol. 208] A. Yes.

By Judge McDermott:

Q. He was so released?

A. Yes.

By Mr. Stuplinski:

Q. That same evening?

A. That same evening.

Q. Now, Captain Gordon, you mentioned, I believe, the fourth occasion for you to visit the theater was in September, '58.

Did you say that?

Mr. Terrell: I don't recall him saying that, and you got to the third visit in November, '57.

Judge McDermott: Nothing about 1958, gentlemen.

Q. Was there a time between November, '57, and November of '59 when you visited the Heights Art Theater, Captain Gordon?

A. Yes, sir; there was.

Q. And when was that?

A. Middle of September of '58.

Q. And will you tell us whether or not you were alone when you visited the theater or in the company of someone else?

[fol. 209] A. I was alone.

Q. What did you do?

Mr. Kleinman: Objection.

Mr. Terrell: Objection.

Judge McDermott: What he did?

Mr. Kleinman: Same ground as the other objections.

Judge McDermott: Overrule the objection on the same theory.

Mr. Terrell: If I may say one thing.

I still move that the other conversations about the first, second, and third visits be stricken from the record, and there is no tieup, and they have gone into the arrest.

Judge McDermott: In view of what they have stated, the Court said that this is perfectly proper for the record, and the prosecutor feels that it was connected up for the record.

Mr. Terrell: We except.

Judge McDermott: The prosecutor has fulfilled his statement about that part of the testimony, and for what it is worth.

Mr. Stuplinski: Thank you, Judge.

[fol. 210] Q. Captain Gordon, the Court has ruled that you may answer the question.

What did you do in September, '58?

A. I had a conversation with the defendant, Jacobellis.

Q. Will you tell us about the conversation, Captain Gordon?

A. Yes, sir.

I met him in the lobby of the theater, and I told him that again I was there on an inquiry from the Chief of Police, Gaffney, and that we had read in the newspapers recent advertisements and reviews of the pictures that he had intended to show entitled Dr. Laurient.

By Mr. Terrell:

Q. What was that again?

A. Dr. Laurient.

Q. How do you spell that?
A. Dr. L-a-u-r-i-e-n-t, but I am not sure.

By Mr. Stuplinski:

Q. Go ahead about the conversation?

A. I informed Mr. Jacobellis that after reading the reviews the chief asked if it was possible to have a preview of the picture as there seemed to be some question as to the legality of the childbirth scene in the picture.

I asked him if he had seen the picture, and he stated he [fol. 211] had, and that he felt the particular scene that I mentioned was done in good taste, and very beautifully acted, and he stated that it was quite difficult to get a preview right away, and he would do what he could, and he asked me if I was aware of the Supreme Court rulings on censorship, and that he didn't have to delete or take anything out of the picture if he didn't want to.

I told Mr. Jacobellis that I was well aware of the Supreme Court ruling, and I thought that we had understood each other about censorship, and that the police department did not intend to censor his picture, and that our purpose in asking for a preview wasn't for the reason of censorship but for the reason to avoid disrupting a public showing of the picture if we contemplated that he would show a picture in violation of the obscenity laws; and I told him again that I felt that it was his responsibility to review the pictures that he would show in the theater, and that I did not feel that he should wait for us to object to a certain part or portion of the picture; and that if we did not have an opportunity to see what he was showing that he would show the picture at his own risk and responsibility; and that if we came to his theater that we would be supporting his own argument on censorship if we told him what to take out; [fol. 212] and he told us that he would let us know if we could ever review Dr. Laurient.

He did telephone the station a day or two later and said that there was a preview showing at the Twentieth Century-Fox studios which I did attend, and I don't believe we had any other conversation on that particular day.

By Mr. Terrell:

Q. You did not have any further conversation?
A. I don't recall any further conversation after that day on Dr. Laurient.

By Mr. Stuplinski:

Q. Now, the film that you viewed at the Cleveland Heights Art Theater on November 12, '59, and the film that you viewed at the Cleveland Heights Art Theater on November 13, '59, will you tell us whether or not they are one and the same picture?
A. Yes, sir; the same picture.
Q. And this Heights Art Theater, is that located in the City of Cleveland Heights, and Cuyahoga County, Captain?
A. Yes.
Q. And it is located in the State of Ohio, Captain Gordon?
A. It is.
[fol. 213] Q. And Mr. Jacobellis that you refer to, is he the defendant in this case?
A. He is.

Mr. Stuplinski: I think that is all I have.
Judge McDermott: And now, gentlemen for the defense.

[fol. 214]

Cross-examination of Captain Earl J. Gordon.

By Mr. Kleinman:

Q. Captain Gordon, you made a determination that this film, The Lovers, was obscene?
A. Yes, sir; I did.
Q. What lustful thoughts did it arouse in your mind?

Mr. Stuplinski: Objection, if the Court please.
Judge McDermott: Wait a minute, gentlemen.

(Conference held at this time between the three judge panel.)

Judge McDermott: Captain, you can answer that in fairness to yourself?

The Witness: Yes, I think I can.
Judge McDermott: That is the basis for the case.
Mr. Stuplinski: May I be heard on the objection?
Judge McDermott: Yes.
Judge McMahon: Step forward, and off the record.

[fol. 215] (Off the record.)

Judge McDermott: Overrule your objection.
Mr. Stuplinski: Exception.
The Witness: Shall I answer that?
Judge McDermott: Yes.
Answer that in your own way.
Mr. Stuplinski: May I hear the question again?
Judge McDermott: Yes. Read it to him, Mr. Sato.

(Question read back.)

Q. Answer the question.

A. In reviewing of the picture, it created somewhat a sexual desire which, of course, I suppressed through my disgust of the picture, mindful of my duties as a police officer, and responsibilities being there and what I intended to do, and I did not allow myself to be carried away with the picture; but, nevertheless, I did maintain a mental picture of the capabilities thereto.

Judge McDermott: That is your answer?

[fol. 216] A. Yes, sir.

Judge McDermott: Let that stand, which was in response to that question, which was a rough one but a fair one, because of what the Court is faced with over here in its deliberations.

Proceed.

Q. Did observing the film cause you to do any anti-social act?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Read the question again, but don't answer it Captain.

(Question read back.)

Judge McDermott: Are you able to answer that in fairness to yourself?

Mr. Osborne: Objection, and may I be heard?

Judge McDermott: We heard your assistant just a moment ago.

Mr. Osborne: But this is another question.

Judge McDermott: Just a moment, gentlemen.

(Conference held between the three judge panel.)

[fol. 217] Judge McDermott: Off the record now.

(Off the record.)

Mr. Kleinman: I will withdraw the question.

Judge McDermott: You are withdrawing the question?

Mr. Kleinman: Yes.

Judge McDermott: All right, then, proceed.

Q. You state that this aroused you sexually, Captain Gordon?

Mr. Osborne: Objection to the repetition.

Judge McDermott: Is that in the record, and he did not say exactly that.

Mr. Kleinman: Could the reporter repeat the answer to the first question?

Judge McDermott: Yes, he could read that other.

(Answer of the Captain read back at this time.)

Mr. Kleinman: If the Court please, he answered that there was a sexual arousement, the way he stated that.

[fol. 218] Judge McDermott: Confine yourself to those words.

Q. Now, based on the fact that you were sexually aroused, is that the basis on which you made your determination of obscenity?

A. No.

Mr. Osborne: Objection, if the Court please.

A. No.

Judge McDermott: Overrule the objection.

Q. May I ask on what basis you made such a determination, Captain Gordon?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection, and he may answer that question, gentlemen.

A. On the basis of the entire movie and its contents.

Q. Did it appeal to your prurient interests?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

[fol. 219] Mr. Osborne: Judge, average person is the standard and not—

Judge McDermott: Overruled, and you may have your exception.

Mr. Osborne: Exception.

Judge McDermott: Prurient is discussed in a certain way by use of a certain adjective, and stick to that.

The Witness: Is there a question now?

Mr. Kleinman: Yes.

Judge McDermott: Read the question to him, Mr. Sato. Yes, or no, Captain.

(Question read back.)

The Witness: May I answer that, Judge?

Judge McDermott: Yes.

A. My answer is similar to the original question that you asked; certainly was capable, and I could detect the ability to do so, and I stand on the ground that I suppressed the influence knowingly, again mindful of my duties as a police officer and in the furtherance of reviewing the film not being carried away.

[fol. 220] This is a mental thing, and I applied mental control, and it was again somewhat subsided by my disgust for the picture itself.

Judge McDermott: Another question now.

Q. I don't mean to embarrass you, but the question is whether or not this film is obscene, and I must ask you some further questions along this line, Captain Gordon.

Mr. Osborne: I will object to this lecture.

Judge McDermott: The attorney is trying to be fair, and it was fair, and let that stand.

Q. The effect in the film wasn't overpowering on your ability to withstand the effect of the film, was it?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

The Witness: Would you repeat the question, sir?

Mr. Kleinman: Mr. Reporter, would you read the question, please?

[fol. 221] (Question read back at this time to the witness.)

Mr. Osborne: I will object, Judge, because it would affect his using two different senses in the same question, and it is hard to distinguish what is meant by the first effect and the second effect.

(Conference of the three judge panel held.)

Judge McDermott: Overrule the objection.

Let him answer.

The Witness: I did not allow the picture to overpower me as you say, as you suggested.

Q. Do you know of anyone who was overpowered by this film in that sense?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustained, and that would be hearsay, and he would only know from what somebody told him, we would think.

Q. Mr. Gordon—I mean Captain Gordon, where did you receive your education?

A. My complete education?

[fol. 222] Q. Start with high school through higher education, Captain.

A. South Euclid, Ohio.

Q. High school in South Euclid?

A. Yes.

Q. And did you go to college?

A. Academies.

Q. What?

A. National F. B. I. Academy, and I also took a number of courses at Western Reserve University, and I attended the London Identification Schools, outside Columbus, Ohio.

Q. Have you had any education in psychiatry or psychology, or similar studies?

A. I studied it on a limited basis with reference to police work.

Q. My question was whether you had any formal education in those fields?

Mr. Osborne: Objection, if the Court please.

The Witness: I have none.

Mr. Terrell: If he has, I haven't got the answer, and he said that what?

Judge Pincura: Who is doing the examining, and one at a time.

[fol. 223] Judge McDermott: Ask him another question.

Q. Captain Gordon, are you familiar with the contemporary community standards of the County of Cuyahoga County with respect to the matter of obscenity?

A. Yes, sir.

Q. And what are the contemporary community standards of the County of Cuyahoga with reference to obscenity, Captain?

A. Are we confining our viewpoint with reference to this picture or in general?

Q. Contemporary community standard of the County of Cuyahoga with reference to this in general?

A. Of course, obscenity itself is not condoned, and frowned upon by the average person, and—

Mr. Kleinman: I ask that be stricken as not being responsive.

Judge Pincura: He hasn't answered the question fully.

Judge McDermott: Let him give his full answer. Go ahead, Captain.

The Witness: A normal average viewpoint on this subject would be, of course, condemnation of any film as ob-

[fol. 224] scene. I think that there is concern for the welfare of our community, and the welfare of our children, and the strength of our nation by the average person when we talk and speak of obscenity, and I think that there is also concern with the average person when we concern ourselves with obscenity as to the effect on each and all of us as far as our security is concerned and the welfare and health of our whole community.

That would be my answer, and there might be other considerations as well.

Q. Question is what the community standard is with reference to obscenity and not how the community feels about obscenity, and how do you determine whether something is obscene based upon community standards?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: I think the Captain has answered at length, and sustain the objection.

Mr. Kleinman: Exception.

Q. Captain Gordon, didn't you attend a meeting in the summer of '59 with reference to the matter of obscenity generally?

Do you recall attending such a meeting, Captain Gordon? [fol. 225] A. Yes, I do.

Q. Do you recall being asked as to your activity with reference to obscene matter?

A. Formally or socially?

Q. At the meeting.

A. I don't recall a question being posed to me.

Q. Do you recall saying to this committee that you are unable to take any action as regards obscenity because you were not familiar with what community standards were, by what you judge whether matter is obscene or not?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Read that back as it is quite lengthy, and we would like to have the opportunity of digesting that a little bit.

(Read back.)

By Judge McDermott:

Q. Do you recall being asked such a question and giving such an answer at such a meeting, Captain Gordon, and maybe you might pin down on when this meeting was and the date.

By Mr. Kleinman:

Q. Captain Gordon—

[fol. 226] Mr. Kleinman: He said that he recalls being at that meeting, and I am asking if at that meeting he made such a statement.

By Judge McDermott:

Q. Do you recall making such an answer, Captain Gordon?

A. I recall being at a meeting, and I did state a viewpoint with reference to obscenity, but not in the way that you said.

By Mr. Kleinman:

Q. Will you state what you said at that meeting, Captain?

A. I was asked by some members; and this wasn't formally a meeting but part of a meeting, and I took no active part in the meeting.

Mr. Osborne: Will you address yourself only to what you said at the meeting, Captain.

Judge McDermott: Leave him with the examiner.

A. It was in answer to a question as to what I thought hampered police officers.

Mr. Osborne: Just a minute. I am addressing the Court.

Judge McDermott: Was a question asked of you at that [fol. 227] time as stated by the attorney here, Mr. Kleinman?

The Witness: My answer is, no, sir.

By Mr. Kleinman:

Q. I am asking you what question was asked of you at that time?

Mr. Osborne: Judge, he said that he did not express himself at the meeting.

Judge McDermott: Wait a minute. He said that he wasn't asked at the meeting, but he had some conversation.

Sustain the objection.

Q. Were you asked any question at that meeting with respect to contemporary community standards and with relation to obscenity?

A. Not at the meeting.

Q. Were you asked before the meeting, Captain Gordon?

A. Yes.

Q. And what were you asked?

A. I was asked my opinion as to what I considered as being a stumbling block, or phrase of that sort, in the prosecution and—for obscenity violations, and I might add that we were not discussing movies at all at this time, [fol. 228] and it was magazines.

Q. When you were asked what the stumbling blocks were for your prosecuting this kind of matter with respect to magazines or books—

A. Yes.

Q. And what was your answer to that question, Captain Gordon?

Judge McDermott: If you recall, Captain.

Mr. Osborne: May we inquire about who asked the question?

Judge McDermott: You will have a chance to ask that later, and there are two sides to every case, and we have to hear both sides.

The Witness: Shall I answer that?

Judge McDermott: Yes.

A. Question was as I stated it but included a suggestion by the person that asked the question if community standards were considered to be a problem for us, and if they were defined as A, B, C.

Judge McDermott: Could we come down to who asked the Captain this question, if they did, in fairness to the truth.

[fol. 229] Q. Who asked you questions at that time with respect to contemporary community standards?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is overruled.

Q. Answer the question, Captain.

A. I am not positive of the name, but there were three ladies in my office at this time, but I am not sure, and I could make a guess, and it could be a member of the P.T.A. of Cleveland Heights.

Q. Will you give us the answer that you gave in response to that question?

A. Yes.

Q. Go ahead.

A. I stated that they asked advice on the establishment of community standards, and they asked me in the question, and I hope that I repeat it properly to the Court, and they wanted to know if they went out by themselves and established a community standard, would that be helpful to us in the forcement of obscenity, and they wanted to know if I would aid them in establishing a community standard, and these questions were linked together.

They approached me in my office, and my answer to that [fol. 230] was that any aid in establishing a community standard that would be recognized by the Court would certainly be helpful to us.

Then I reminded her and the three women that were there that I did not intend to partake in the establishment of this community standard, and if I went to the meeting that they had proposed a few weeks from that day that I would do so only as an observer, and they told me that they intended to have a meeting, and that is as close as I can answer.

Q. Are you suggesting Captain Gordon that at that time there were no contemporary community standards and that they were going to establish one?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is sustained.

Mr. Kleinman: Objection was sustained?

Judge McDermott: Yes, and that is 1959.

Mr. Kleinman: This was just prior to the seizure of this film, your Honor.

Judge McDermott: But he can't answer for the whole community.

[fol. 231] Mr. Kleinman: I am asking him if he had any

knowledge of a contemporary community standard in the summer of '59?

Q. Did you know of a contemporary community standard as regards obscenity at the time of this meeting that we alluded to sometime in the summer of 1959?

Mr. Osborne: Objection, if the Court please.

The Court: Overrule the objection.

Q. You may answer.

A. Yes, sir.

Q. You knew the community standard at that time, Captain Gordon?

A. Yes.

Q. And did you advise these people at the meeting what the community standard was?

A. No, sir.

Q. Did they ask you what the community standard in the community was?

A. That wasn't the purpose to seek out.

Q. I understood you to say that if they brought you in some written community standard that this would assist you in prosecuting these kind of cases?

[fol. 232] Mr. Osborne: Objection, and there was no writing talked about.

Judge McDermott: Just a moment now.

Sustain the objection, and the Court would like to comment that different groups start out at different times in this community and in all communities with their own individual thinking, and we don't know these people.

Mr. Kleinman: If the Court please, my cross-examination of the witness is as to this witness's knowledge at that time.

Judge McMahon: The Court has ruled, Mr. Kleinman.

Q. How many motion picture films do you see in the course of a year, Captain Gordon?

A. Varies, sir. 20, 30, 40.

Q. Do you see them socially or in your official capacity?

A. Both.

Q. 20, 30, 40?

A. Yes.

Q. Could you pin that down?

A. Depends on what year.

Q. How about 1959? How many movies did you see during 1959?

[fol. 233] A. Including television, and I might say 100.

Q. I am speaking of movies in the theater.

Judge McDermott: That is the only place.

A. I see movies on television, too.

Q. Only in the theater?

A. About 20.

Q. 20?

A. Yes.

Q. Do you attend any particular theaters to see these films?

A. Yes, sir.

Q. What theater is that?

A. Well, those that I attend in my official capacity would be Cedar Lee Theater and the Heights Art Theater, and those I have attended on a sociable basis with my family and friends are maybe the Cedar Lee Theater and any theater in my neighborhood, and occasionally one of those downtown.

Q. Aside from The Lovers, have you seen any obscene picture films in the year 1959?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is overruled.

[fol. 234] A. No, sir.

Judge McDermott: Answer is no.

Mr. Kleinman: He did say no?

Judge McDermott: Right.

Q. Did you see Room at the Top?

A. No, sir.

Q. Did you see Crack in the Mirror?

Mr. Osborne: I will object, if the Court please.

Judge McDermott: Sustain the objection, and we don't know anything about those shows, and he said that he did not see any obscene pictures except this one.

Mr. Terrell: If the Court please, I object to the remark that this is obscene from the Court.

Judge McDermott: The Captain has said that, that he did not see any obscene pictures except this one.

Q. Aside from the film, The Lovers, have you ever seen any obscene motion picture films?

A. Yes, sir.

Q. And when was that?

A. Well, we see them in our official course of business where we make arrests for stags at the Cleveland Heights [fol. 235] area.

Q. You have seen stag movies in the Cleveland Heights area?

A. Yes.

Q. Have you seen an obscene motion picture film being exhibited to the public in Greater Cleveland in one of the movies?

A. No, sir, other than the present picture that we are discussing.

Q. This is the only obscene film that you have seen exhibited for public showing in a theater, Captain Gordon?

A. For public showing, yes.

Q. Will you describe—withdraw that.

You stated that you have seen stag movies in the City of Cleveland Heights in your official capacity, Captain?

A. Yes, sir.

Q. Have you made any arrests in connection therewith, Captain?

A. Yes.

Q. Will you describe the procedure in making such arrests?

Mr. Osborne: Objection, if the Court please.

[fol. 236] Judge McDermott: Sustain the objection.

Q. In determining whether such stag movies were obscene, did you use the contemporary community standard and the average man in the community in making such determination?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Answer on the same basis as you answered before, if you can answer that, Captain.

A. Well, the stag films that we had confiscated and arrests were made prior to my knowledge of the present Supreme Court rulings; but since I have been aware of the recent Supreme Court rulings and the law on obscenity as distinguished today, I have applied it. However, I might add that we haven't made a stag film arrest since 1953.

Q. Have you made any arrests for obscenity since the Roth case in 1957?

A. Yes, sir, but not movies.

Q. Other forms of expression, magazines?

A. No, sir; not magazines.

Q. Books?

A. Yes.

[fol. 237] Q. Now, with reference to the film, The Lovers, would you tell this Court at what point in the film your prurient interests were aroused?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Read the question, please, and I am asked about a point of law from the judges.

(Question read back.)

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection, if any, and the answer is pertinent, we feel.

Mr. Osborne: May I make this observation. Under the Supreme Court definition the ruling is that the dominant purpose of the film taken as a whole appeals to the Prurient interest, and does not isolate itself for a moment, and the thing as a whole must be construed, and that is the law, your Honors.

Mr. Kleinman: Exactly the point, your Honor.

Mr. Osborne: Package deal.

Judge McDermott: Yes, it is a package deal, but—

[fol. 238] (Conference of the three judge panel held at this time.)

Judge McDermott: Court has sustained the objection, and we think that the prosecutor's point is well taken, and

it is a package deal, and from all four corners it should be considered, and that is our ruling.

Proceed.

Mr. Kleinman: Exception.

Judge McDermott: That is the opinion of all of the judges here.

Q. Captain Gordon, did you make this determination as a result of your own feelings of pruriency or of those of the average man based upon contemporary community standards?

A. As of the average man, based on contemporary community standards.

Q. But you can't name the average man?

A. No.

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection, and he could not name the average man.

[fol. 239] Q. How do you arrive at whether or not this would appeal to the prurient interests of the average man, Captain?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Court thinks that he has covered it at length and will let him do that again, and overrule the objection.

Will you answer that again, Captain Gordon?

A. Yes, sir.

One way would be—to be an average man, in order to determine what an average man would think and average person.

I believe that I am an average person, and I must consider what the average person would feel, and your question is how do I decide what an average person feels?

Q. Yes.

How do you decide whether this picture appeals to the prurient interest of the average man, based on contemporary community standards?

A. In discussing sex, whether it be on an official basis or social basis, I have found that I have concurred with the ideas of the majority number of people in this as

[fol. 240] distinguished from the minority group who hold themselves as liberals or other things, one thing and another, and my thinking has been identical to the average person that I have talked to, and I consider myself as an average man, and on the basis that I have used average intelligence, and I come to the conclusion that my opinion was based in accordance with the average person, and I use man, and I mean person, and I am not confining my conversations to a male only.

Q. You say that your thoughts on this matter would be pretty much in line with the majority of the people, Captain?

A. Yes.

Q. Are these average people, or just majority people, Captain?

A. In my definition the average person is made up of the majority group and not the minority group, and that is as against the minority, and there is always one in every group who is for anything; and in discussing this, whether it be groups or individually, my thoughts concur with them, and with the categories of the majority thinking.

Q. Is it your contention, Captain Gordon, that the matter of obscenity can be determined by a majority vote of the community?

[fol. 241] Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is sustained.

Q. And you take in account in determining the effect on the average man the minority opinion of the community?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection on the same theory.

Q. Are you familiar with the makeup of the community of Cuyahoga County?

A. Yes, sir.

Q. How many negroes in the County of Cuyahoga?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection.

Q. How many Protestants in the County of Cuyahoga, Captain?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Yes, sustain the objection.

[fol. 242] I don't think that religion goes into it.

Mr. Kleinman: I am getting into who the average man is in this community, your Honor.

Judge McDermott: I don't think that makes any difference about his race, creed, or color.

Mr. Kleinman: If the Court please, the only purpose is to see if he is able to know what the average man thinks, taking into account everyone in the community.

Judge McDermott: Mr. Kleinman, your notion is test what our community consists of?

Mr. Kleinman: That is correct, your Honor.

Judge McDermott: Just a moment now.

(Conference among the three judge panel held.)

Judge McDermott: Judge Pincura thinks that you are right, and Judge McMahon thinks the same, and opposed to what I thought from the start of the question.

[fol. 243] The Witness: Will you repeat the question?

Judge Pincura: May I suggest, why not phrase it broadly so that he could cover it in one question.

Mr. Kleinman: I will do so, your Honor.

Q. I will ask you, Captain Gordon, if you are familiar of your own knowledge of the various segments of people who populate Cuyahoga County, which may be composed of Negroes, Whites, Catholics, Protestants, Jews, and Germanic, Nordic, and others?

A. In general, I could, but I don't know the specific percentages, of course.

Q. In your conversations with people that you just referred to in matters of sex, have you discussed this privately and officially with all branches of the population of the County of Cuyahoga?

A. I have never kept a list as to the nationalities of everyone that I have talked to, but I think in my occupation I get a very good cross-section of the various peoples, whether they be victims of sex offenses or whether they are the defendants in sex, or whether we are discussing this thing socially by groups or individuals.

[fol. 244] Q. Well, these persons who are the sex offenders, you talk to them about sex?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection.

Mr. Kleinman: I want to go into that again.

Judge McDermott: Sustained, and that is getting far afield.

Q. Did the conversations with those sex offenders have anything to do with your opinion about what the contemporary community standard is?

A. No, sir.

Q. What about the victims of the sex offenses? Have your conversations with them determined what the contemporary community standard of the City of Cleveland, or Cuyahoga County, is?

A. Yes, throw their opinions into the pile to be measured, and certainly they are average people.

Q. When you come in contact with people in connection with your employment in Cleveland Heights, they are largely people of Cleveland Heights?

Mr. Osborne: Objection, if the Court please.

[fol. 245] A. It depends upon what the investigation is, and many offenders are out of the city, and they do not necessarily reside in Cleveland Heights, and I don't mean to confine myself to people of Cleveland Heights only.

Q. Do you discuss sex questions with people in Lakewood, Ohio, for example?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overruled.

By Judge McDermott:

Q. Have you had occasion to?

A. Yes.

By Mr. Kleinman:

Q. How many people?

A. I never count them.

Q. How about Parma?
A. Parma, especially.
Q. Middleburgh Heights?
A. I can't recall Middleburgh Heights.
Q. How about South Euclid?
A. Yes.
Q. North Royalton?
A. I don't know.
Q. Berea?
[fol. 246] A. I don't recall.

I wouldn't deny that I haven't, but I don't always ascertain a man's address if he is in the group or committee or the gathering, and I don't ask everybody where they live, but certain ones I definitely do recall where I did ask.

Q. Captain Gordon, getting back to the night when you saw the film, The Lovers, at the Heights Art Theater, that was November 12th; is that correct?
A. First showing?
Q. First showing, November 12th.
A. Yes, sir.
Q. The indictment relates to the showing of November 13th; is that correct?
A. Yes, sir.
Q. Was the same film shown on the 12th and 13th, as far as you saw? Was it the same film?
A. Yes, sir.
Q. Well, your arrest was made on the 13th of November, was it not?
A. Yes.
Q. And not on the 12th?
A. That is correct.
Q. In fact, after you saw the film on the 12th, you left the theater and went back to your office, did you not?
[fol. 247] A. I stopped briefly at the office, and then I went home.
Q. But you did see the film in its entirety on the 12th?
A. Yes.
Q. Did you say anything to anyone in the theater on the 12th?
A. No.
Q. Have you ever had occasion to advise Nico Jacobellis,

the defendant in this case, not to exhibit a motion picture film?

A. I have never advised him not to.

Q. Have you ever advised him prior to this time not to show a film?

A. No.

Q. Have you ever advised him to cut any part of a film before it was shown?

A. No, sir, but he asked me what I thought of a portion of a play, but I said that I did not like that, and—

Q. And you did not make any arrest?

A. No.

Q. Have you ever made an arrest at the Heights Art Theater since Nico Jacobellis has been manager of the [fol. 248] theater?

A. At the theater now, and not referring to the manager of the theater, I believe that we did arrest a pervert in there once, and—

By Mr. Osborne:

Q. Arrested what?

A. Arrested a pervert in the theater on the complaint of a woman that he be arrested, but I don't know if he was manager at that time.

By Mr. Kleinman:

Q. But the question is since Nico Jacobellis has been manager of this theater?

A. I will have to say that I am not sure.

Q. Have you ever had occasion to arrest anyone in connection with the management of the theater?

A. No, sir.

Q. Now, you have testified that on several occasions you asked to see various film before they were shown, Captain?

A. Yes.

Q. And did you see them?

A. On three of the four requests we did.

Q. Were you ever refused permission to see a film, Captain?

A. Yes.

[fol. 249] Q. When was that?

A. November 12, 1959.

Q. You were refused permission to see a film, Captain?

A. Are we still talking about the preview?

Q. Preview on that day, you called about when?

A. Three.

Q. And asked for a preview?

A. Yes.

Q. And what did Nico Jacobellis say?

A. He refused, and he said that he could not do so.

Q. Did you ask him if you could come and see the film?

A. Yes.

Q. And did you pay for that?

A. No.

Q. And he told you to come and admitted you?

A. Yes, and he wasn't there to greet me with open hands and left word.

Q. But, notwithstanding that, you had seen the film from the beginning to the end on November 12, 1959, you made no arrest and placed no charges against Nico or anyone connected with the Heights Art Theater?

A. I—

Mr. Osborne: Objection to the repetition.

[fol. 250] Judge McDermott: Would you repeat that question, and I didn't hear that last part of it.

Q. After having seen the film in its entirety on November 12th you made no arrest or no censorship of the film, and no arrest of anyone connected with the Heights Art Theater, on November 12th?

A. That is correct.

Judge McDermott: He has already testified to that.

Q. On November 13th you saw the film again; is that correct?

A. Yes, sir.

Q. Was this of your own volition?

A. Pardon?

Q. Was this of your own volition that you went to see the film on Friday?

A. It was under orders of the Chief of Police, Edward Gaffney, and in cooperation with the conversation we had with the County Prosecutor, John T. Corrigan, and King Wilmot.

Q. On the 12th day you go over there on the instructions of Chief of Police Gaffney?

A. Yes.

[fol. 251] A. And on the 13th?

A. My instructions were to cooperate with the County Prosecutor, and—

Q. And how did the County Prosecutor come to see the film on November 13th?

A. After seeing the film on the 12th I reported my findings to Chief of Police Edward Gaffney on the morning of the 13th, and following our conversation Chief Gaffney and City Law Director King Wilmot and I telephoned Mr. Corrigan, and I informed him.

Q. Informed him of what?

A. Of the picture that was presently being shown on the 12th, and intended to be shown again on the 13th at the Heights Art Theater called The Lovers, and I called that to his attention.

Q. Is this the procedure that you customarily follow with reference to obscene matter?

Mr. Osborne: Objection.

Judge McDermott: Sustain the objection.

He has already testified to that.

Q. What was the purpose of the call to Prosecutor Corrigan?

Mr. Osborne: Objection, if the Court please.

[fol. 252] Judge McDermott: Sustain the objection.

Q. If the Court please, may I know the reason?

Judge McDermott: That speaks for itself. Authority.

Q. What about King Wilmot? How did he happen to come to this viewing on Friday, the 13th?

A. Came on his own decision, and part of his responsibilities as law director of the City of Cleveland Heights.

Q. Had you advised him of the film before he came on Friday?

A. Yes, sir.

Q. How about Mr. Corrigan? Did he come as a result of the conversation with you?

A. Mr. Corrigan did not have any conversation with me, and I presume that he had a conversation with the Chief of Police, but I could not testify what that was.

Q. You have stated that you made a determination that this film was obscene?

A. Yes, sir.

Q. Did you make that on the 12th or on the 13th, that determination?

A. I made that on the 12th.

[fol. 253] Q. You did not arrest on the 12th?

A. No, sir.

Mr. Osborne: Objection, and repetition.

Judge McDermott: Sustained, and that is in the record three or four times already.

Gentlemen, we should stop now.

Judge McMahon: Will your cross-examination take sometime now?

Mr. Kleinman: Yes.

Judge McDermott: Let us adjourn until 1:30 and adjourn court until that time.

(At this time Court adjourned for luncheon until 1:30 P.M. this afternoon.)

[fol. 54] Wednesday afternoon, May 25, 1960, at 1:30 P.M.

Judge McDermott: Captain Gordon, will you resume the stand.

Mr. Kleinman: Waiting for the prosecutors, and they should be back in a moment.

Judge McDermott: All right. 1:30 was the hour, and the Court is always ready.

(Off the record.)

Judge McDermott: Let us go ahead now.

By Mr. Kleinman:

Q. Captain Gordon, we spoke about the average man and the contemporary community standard, and it is my recollection that you testified in making your determination you considered yourself an average man in the community?

A. Yes.

Q. You stated that in your determination of what was the community standard you drew on your experience in your discussions with various people during the course of your occupation and otherwise in matters regarding sex.

Is that correct?

[fol. 255] A. If we are going to pertain community standards just to the standards of sex.

Q. Speaking of contemporary community standards as relate to matters of obscenity, and I believe that you have discussed this problem of sex with groups of people in the community?

A. Yes.

Q. And you used these discussions as the basis for determining what the community standards were in your comparison of this film, The Lovers?

A. Yes.

Q. In these discussions what kind of things did you discuss?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Question is too broad, and sustain the objection.

Q. Did you discuss the question of adultery with these people?

A. Yes, sir.

Q. And did these discussions arrive at any conclusions that adultery was a problem in present day society?

Mr. Osborne: Objection, if the Court please.

[fol. 256] Judge McDermott: Speaks for itself in my thinking, and the other judges, too, I think.

Q. But you did discuss the subject of adultery, Captain?

A. Yes.

Q. Did you discuss the problem relating to adultery, Captain?

A. Well, if you discuss adultery, you would be discussing the problems.

Q. And did you discuss the possible causes of adultery?

A. Yes.

Q. Did you discuss the effects of adultery, Captain?

A. Yes, sir.

Q. Now, this film, The Lovers, deals with the subject of adultery, does it not?

A. Yes, sir.

Q. Did the subject of adultery appeal to your prurient interests?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Can you answer that fairly to yourself? If you can, then you have a right to answer that [fol. 257] question.

The Witness: Yes, sir.

Judge McDermott: Overrule the objection then.

Q. Did the subject of adultery—

A. No, sir; not the subject of adultery.

Q. It did not appeal to your prurient interests, Captain?

A. No, sir.

Q. Now, did the map, which was shown as part of the credits for the film, did that appeal to your prurient interests?

Mr. Osborne: Objection, if the Court please.

I would like to be heard on that subject, if I may.

Judge McDermott: Objection is sustained, and confine it to the whole picture.

Mr. Kleinman: If the Court please, the witness has testified that one of the subjects of the film, adultery, did not appeal to his prurient interests, and we have a right to test his answer, whether the dominant theme as a whole appeals to the prurient interests.

[fol. 258] Judge Pincura: Ask him that question.

Judge McDermott: Seems that you are going to go into every single part of the picture, rather than taking the picture as a whole.

Q. Did the dominant theme of this film, that is, The Lovers, based on contemporary community standards, appeal to your prurient interests?

A. Yes, sir.

Q. What theme was that that appealed to your prurient interests?

A. Theme relating to sex in general.

Q. You say that sex is obscene?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is sustained.

Mr. Kleinman: He said that it is sex.

Mr. Osborne: On second thought, I will withdraw the objection.

Q. You say that the theme of the film that appeals to the prurient interests is sex; is that correct, Captain?

[fol. 259] A. Yes, sir.

Q. Do I take it, then, that sex is obscene from your answer?

A. No, sir, not by itself.

Q. Not by itself?

A. No.

Q. You have testified that one of the things in the picture is adultery?

A. Yes, sir.

Q. And another theme is sex?

A. I did not say that one theme was adultery, but you said that.

Q. How many themes are there in this picture that you have recognized?

A. I haven't counted them.

Q. Could you cite some of the themes in this film?

A. I believe that I could.

Q. Will you state the themes of the film?

A. We will start with the dominant theme which was sex, and that was throughout: the theme of adultery; abandonment by the wife of her child and husband, and the theme of the unnatural sex act, and the instability of the wife, if you would call it that, in the picture as to her respect for property, hers and others.

[fol. 260] Also, her lack of consideration to her own respect for herself and her family, and possibly others as well, too.

Q. There were a number of themes?

Judge McDermott: He hasn't finished his answer.

The Witness: Yes.

Q. Those were the themes that you recognized and found?

A. Yes.

Q. So that there were a number of themes in the film, Captain? I am talking about those aside from sex?

A. Yes, sir.

Q. Now, you say that the dominant theme of the film was sex; is that correct?

A. That is correct.

Q. And it is this theme that was an appeal to the prurient interests?

A. Yes, sir.

Q. None of the other themes appealed to the prurient interest, did they?

Mr. Osborne: Objection, if the Court please.

[fol. 261] Judge McDermott: Sustained, and speaks for itself, and he has related a number of instances, and said that there were others, too, and he has answered.

Go on to something else now.

Mr. Kleinman: I don't think that he has answered.

Judge McDermott: Sustain the objection, and you have a right to cross-examine the witness.

Q. The theme of abandonment did not appeal to your prurient interests?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. No, sir.

Q. The theme of disregard for the rights of property and persons, that did not appeal to your prurient interests?

A. They occur in various stages of the movie, and some parts were surrounded by sex, and when she left her automobile and abandoned it in the middle of the street.

[fol. 262] Q. But that theme did not appeal to your prurient interests?

A. You will have to describe the part of the theme that you have reference to.

Q. The theme that you describe where she had disregard for personal property. At what point in the film did this show?

A. Various stages, and I mentioned one.

Q. When she left her own car?

A. Yes.

Q. Did this appeal to your prurient interests, Captain Gordon?

A. No, sir.

Q. Any other example of disregard for property, Captain Gordon?

A. You asked me what are the other examples? Is that your question?

Q. Yes.

Judge McDermott: Don't forget that we ruled this morning that we take the picture from all four angles.

Mr. Kleinman: I have no objection to that, but I want to test if he is making the test from all four angles.

[fol. 263] Judge McDermott: We thought that he should review the picture from all four angles and does that add up, and that is the question for the Court.

Mr. Kleinman: However, if he says, yes, I don't have to accept that answer, and I have a right to test him.

Judge McDermott: Test him about his honesty and credibility and see where the truth is.

You have not been limited very much, have you?

Mr. Kleinman: No, but I feel I could use a little more liberty on that score, and this is a difficult problem.

Judge McDermott: You are doing all right, and doing good.

Q. I think my last question was whether there were any other situations in the film which indicate this so-called theme of disregard for property.

I then asked you if you could cite some other example of this?

A. Yes.

Q. What other example?

[fol. 264] A. In the manner in which she would discard her clothing about the room, and the fact that in the conversation in the picture her husband accused her that if she

stayed more at home she would know more about what was going on.

Q. Did this appeal to your prurient interests?

A. Which one?

Q. Any of these?

A. Any or all?

Q. Any or all.

A. No, sir.

Q. You said that one of the themes of the film was sex?

A. Yes, sir.

Q. Give us some of the examples of the appearance of sex as appeared in this film?

A. This is dominant in the entire production.

Q. Well, you have just given me examples of disregard of the property and abandonment, and give me some of the examples of sex as they appear in this film, Captain Gordon?

A. Conversation, of course, as established by the English sub-titles where to begin with she is talking with her girl friend in the room in Paris, at which time she is speaking of [fol. 265] love for another man, other than her husband, and love embraces in the beginning is sex, and it leads up throughout the entire production, and it becomes very apparent in the evening set, latter part of the picture, during which time her boy friend, the polo player, makes an attempt to get her to go into his room on retiring, which she refuses.

Of course, it becomes strongest when she gets the young archeologist—when she meets him out on the estate, and probably is apparent for the first time when they reach and hold hands while standing by the small river there, and proceeds through as they go across the fields and get into the woods and get into a rowboat, and go into an embrace.

It is further illustrated by the fact that her clothing was somewhat rearranged upon completing this boat ride, and the presumption is that they were in the company of each other throughout the whole boat ride.

The conversation throughout the picture at this point indicates his desire and her desire, and there is an indication of sex affection and love, and it is climaxed in the last bedroom scene where they disrobe each other, and the young archeologist assumed the position on top of her,

followed by hugging and kissing her all over, and display [fol. 266] affection there, and throughout the rest of the picture.

Q. You say that the discussions which she had with her girl friend in regard to love, did that appeal to your prurient interests?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is overruled.

Mr. Osborne: Judge, may I suggest that it isn't taking the film as a whole in a question like this, and the question is isolating a particular part of the film, to determine whether or not that part appeals to the prurient interest.

(Conference held of the three judge panel.)

Judge McDermott: Court is mindful of the fact that the defense counsel is trying to break down every part of it, and we are regarding the picture from the beginning to the end, as a whole.

The Witness: Will you repeat the question?

[fol. 267] Mr. Kleinman: Mr. Reporter, will you repeat the question, please?

(Question read back.)

Judge McDermott: Is there a question before you?

Mr. Kleinman: Yes, as to whether the conversation with her girl friend in Paris with regard to love appeals to his prurient interests.

Judge McDermott: Will you answer that, Captain?

A. It has a basic influence on that inasmuch as it tends to show the character of the woman in the place.

Q. Did it appeal to your prurient interests?

A. My prurient interests was gained on the complete picture, and this is part of the picture only, and I presume that it had its effect definitely involved in the situation.

Q. Did that particular scene appeal to your prurient interests?

Mr. Osborne: Objection to the repetition.

Mr. Kleinman: He hasn't answered the question, if the Court please.

[fol. 268] Judge McDermott: Answer that for him, Captain, if you can.

A. I can only say that all by itself—it is as one word in a joke would not be funny, but the whole joke is funny.

By itself my answer is no, but as part of and attached to the rest of this picture, the same as one word is part of the joke and by itself it isn't funny, but the whole joke is funny when taken as a whole, and that is how I can put that.

Judge McDermott: You should confine yourself to the whole picture, because the law is that the various parts are not the whole thing.

Mr. Kleinman: But I am trying to show that his judgment is based on part of this film.

Judge McDermott: I don't think that his testimony was that, and he said certain things about the whole film.

Mr. Kleinman: But I am not bound by his answer!

If he tells me that he made his determination based on the matter as a whole, can't I examine as to whether or not [fol. 269] he did?

Judge McDermott: I think that you are limited.

Mr. Kleinman: I agree, but supposing that—

Judge McDermott: That is in the decision.

Mr. Kleinman: Supposing that he made the tests on one scene, and—

Mr. Osborne: Ask him that question.

Judge McDermott: We have to limit you somewhere, and the law is clear, and the findings in the body of the opinion is quite clear.

Mr. Kleinman: The dominant theme of the material as a whole is the question that we are trying to arrive at, and he has said that he has made his determination on that basis, and I would like to demonstrate that he did not, and his answer should not be binding upon me, your Honor.

Judge McDermott: You have had wide latitude, but examine on the whole picture.

[fol. 270] Mr. Kleinman: He has already admitted that there are other themes.

Judge McDermott: We have not limited you.

Mr. Osborne: We will withdraw our objection.

Judge McDermott: The Captain is taking care of himself in his answers, and he can answer, and let him answer.

Q. At the point, Captain, where this discussion took place, you don't know what is coming later on; do you or don't you?

A. My first impression as I seen the picture the first time?

Q. Yes, the first time that you saw the film.

Q. You did not know what was coming later on in the film?

A. Obviously not, unless I wrote the play.

Judge McDermott: You said, obviously not because you did not write the play?

The Witness: Yes.

Q. But at that point this conversation did not appeal to your prurient interests?

Mr. Osborne: Objection, if the Court please.

[fol. 271] Judge McDermott: He has answered, and the Court sustained the objection.

The Witness: I will repeat my original answer, and I said by itself.

Mr. Osborne: There is no question.

Judge McDermott: Strike out his last answer.

Q. At what point in the picture did you determine the dominant theme of the film?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection, and let him answer. He was there and saw it.

A. I did not make a decision until I saw the film through completely, and, therefore, I did not start at the very center, beginning, or end, but my determination was based on the whole picture from the map up until the end where they ride down the road.

Q. Will you tell us what is the significance about the map?

A. Symbolic map, I presume of France.

Q. Is there any prurient significance in that map, Cap-

[fol. 272] tain Gordon?

A. Well, again, I did not write or draw the map. If you mean as to my opinion, I could not answer that.

Q. You said starting with the map?

A. Map was the beginning of the movie, and I said that

I made my decision on the complete movie starting from the map, but I did not pick out the map.

Q. Prosecution has mentioned the map.

Mr. Osborne: I will object, if the Court please.

Judge McDermott: What he said about the prosecution is not evidence. Give him another question.

Q. What is the significance of the map?

A. I might say that I am not sure.

Q. And yet this was all part of the dominant theme of sex?

A. Is that a question or an answer?

Q. Question.

A. You better complete that, and I got that as an answer.

Q. Is this map part of what you call the dominant theme of sex in this film?

A. Part of the movie.

Q. But is this part of the dominant theme of sex, Captain [fol. 273] Gordon?

Judge McDermott: He said it is part of the movie, and he said that the movie was so and so, and I think that he has answered the question.

Q. As an officer of the law, Captain Gordon, do you know the meaning of the word, prurient?

A. Yes, sir.

Q. Would you define the word, prurient?

A. Itching, longing for lustful desires or emotions.

Q. And when in this film did you first feel this itching, longing, and lustful emotions?

Mr. Stuplinski: Objection, if the Court please.

Judge McDermott: Overrule the objection.

Can you answer the question in fairness to yourself, Captain Gordon?

The Witness: Yes.

Judge McDermott: Then, you may do so.

The Witness: May I have that again to be sure?

Judge McDermott: Read the question to the witness, Mr. Sato.

[fol. 274] (Question read back at this time.)

A. I don't think that I could confine it to any particular part as you ask.

That would be my answer.

Q. You can't confine that to a particular part of the picture?

A. No.

Q. It wasn't the map when you saw the map; was it, Captain?

A. No, sir.

Q. It wasn't the scene at the polo game?

A. No.

Q. It wasn't there at the time when she was traveling on the road—

A. No.

Q. —when the kids waved to her going by in the car.

It wasn't at that time?

A. No, sir.

Q. It wasn't during her trip with the archaeologist to visit his professor friend; was it?

A. No, sir.

Q. Was it at the time that she returned from this trip to her home with the archaeologist? Did you feel it at that point yet?

[fol. 275] A. Well, as I have answered, I could not tell you specifically where.

Q. But just try to think.

A. I don't recall.

Q. Do you recall having felt that itching, Captain Gordon?

A. I said I don't recall.

Q. You did not feel that at all throughout this film, Captain?

A. I believe I have answered that question.

Judge McDermott: I think that he answered that this morning, and you should stay with the answer at length that he gave you this morning.

Q. This is cross-examination, if the Court please.

Judge McDermott: But you had that this morning.

Q. You did feel this itching during the course of the film at sometime?

A. I did not say that.
Q. Did you feel this itching during the course of the film?
A. I believe that I answered that this morning.
Q. But you said that you did.
A. If that is your recollection.

[fol. 276] Judge McDermott: The answer is in the record, and I don't remember that he has said anything about itching, and his answer is in the record as of this morning.

Mr. Kleinman: May I have my memory refreshed?

Judge McDermott: I think we should leave that now.

Mr. Kleinman: I must know the answer!

Judge McDermott: Relax, and let the reporter get this.

Mr. Terrell: I think that we are playing games, and wouldn't it be simpler to have him answer that?

Judge McDermott: Let the reporter go back, and be fair with the witness, gentlemen, and these are rough questions to be asked of anybody let alone an enforcement officer, and the Court wants to be fair to all, and let John Sato go back in the record and review his shorthand notes.

Relax, Captain.

Mr. Stuplinski: I would like to know first of all whether [fol. 277] Mr. Wright is attorney of record in this case, and what is he doing in the courtroom?

Judge McDermott: He is an officer of the Court, and he is on business.

Mr. Stuplinski: Is he an attorney of record in this case?

Mr. Terrell: If it is of any moment, we will make him an attorney of record.

Mr. Wright: I was unable to be here Monday morning, and Mr. Sato did not have my name in the official record as a result of that.

Mr. Terrell: Any objection to that?

Mr. Stuplinski: I want to know this.

Judge McDermott: I will say this, that if Mr. Wright wants to ask questions, he can do that.

However, Mr. Wright, I will ask you to keep your place. The prosecutor knows you, though.

I'll ask you to keep your seat and don't appear back of the [fol. 278] witness stand any more.

Mr. Stuplinski: Judge, let me get this straight. If Mr.

Wright wants to sit at the table, I have no objection, but I want to know who the lawyers are in this case, and I have a right to know that.

Judge McDermott: It is very evident who the lawyers are.

Mr. Wright: I would be glad to have my name appear on the record as one of the attorneys for the defense, and it wasn't entered Monday morning because I wasn't here.

Judge McDermott: Is he one of your associates?

Mr. Terrell: Yes, and we will be honored if you add his name to the defense counsel.

Mr. Osborne: It is up to the defendant to pick his lawyers.

Judge McDermott: Mr. Jacobellis, is he one of your associate counsel?

Mr. Terrell: Let the record show that Mr. Jacobellis said yes.

Judge McDermott: Why waste time, and let us go ahead, and one lawyer at a time on the floor, and let us get on [fol. 279] with the case.

Judge McDermott: Can't we let that stand?

Mr. Kleinman: If the Court please, I don't mean to embarrass the witness, but I have a case to try on behalf of the defendant who is charged with a serious crime, and this is a very difficult field to get into; and I have a right to test this man who has censored this film, and I should have some latitude on this, your Honor.

Judge McDermott: I think the Captain should stand on his answer.

Mr. Osborne: We will object to Mr. Kleinman's statement that this is the man who censored the film. There is no censorship whatsoever, and there is no censorship in the State of Ohio since December, 1954.

Judge McDermott: Record will show that there is no censorship of this film, and the lawyers' statements are not evidence, and there has been no censorship of this film.

It is a matter of law as the Captain saw his duty to be, and we are here to try this matter, and the fact that he is [fol. 280] indicted in itself is not evidence of his guilt, but merely a formal presentation to him of the charges that were made against him by the Grand Jury of this county in writing with reference to violation of certain state laws,

and he has pleaded not guilty, and he is presumed to be innocent until proven guilty beyond a reasonable doubt, and that is the law.

Now, go ahead, Mr. Kleinman.

By Mr. Kleinman:

Q. Captain Gordon, if the so-called bedroom scene were removed from this film, would you change your opinion as to whether the film was obscene or not?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

The Witness: I am not sure I understand Mr. Kleinman's question, and I will have to ask you a question before I could give an answer.

You mean the whole last reel of that film that consisted of the bedroom scene? Which bedroom scene do you mean?

Q. I am talking about from the time just before the hero- [fol. 281] ine of the film goes into her daughter's room until the next morning when they are awakened to go on the fishing trip.

If that were removed from the film, would that change your opinion as to whether or not the film was obscene?

A. I believe it would, sir.

Q. What would your opinion then be as to the film that we are talking about, assuming that it was eliminated from the picture?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection.

Mr. Kleinman: He said that it would be different.

Judge McDermott: Doesn't make any difference, and you have pinned him down to one point, and the question is about the entire picture.

Mr. Kleinman: If your Honor please—

Judge McDermott: Court will stand on the ruling, and the witness can tell what he thinks about it as a whole.

[fol. 282] Q. You testified previously, Captain, that you have made arrests for stag movies?

A. Yes, sir.

Q. Would you describe in general terms what a stag movie is?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: He is an officer for fourteen years, and let him tell that, but it has no reference to this case.

A. That is a movie that actually doesn't differ much from what we have in question now, but it consists of sixteen millimeter film of twenty minutes duration, and this—picture of the stag movie consists of sex, dominant sex.

Q. Would you say, Captain, that this picture, The Lovers, is a stag movie?

A. Well, I believe that there is no actual definition of stag movie as you may use the term, and somebody else may use the term.

Q. You tell us in your own opinion how you use the term about stag movies?

A. I just answered that.

Q. And you say The Lovers falls within your definition of a stag movie?

[fol. 283] A. No, barring limitations that I just mentioned in the first answer.

Q. Isn't it a fact that a stag movie shows sexual acts one after another in various forms?

A. May be just one sex act, and I don't believe that there is any definition how many sex acts can be shown before that is considered as a stag movie.

Q. Is there anything else in a stag movie?

A. Often other things, and people going through the park.

Q. Is there any story in a stag movie?

A. Yes, I have seen stories.

Q. What is the difference between The Lovers and a stag movie?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustained.

By Judge McDermott:

Q. Are those sometimes groups or clubs that go to them, Captain?

A. Not necessarily an organization, your Honor, and could be just a group of people.

Judge McDermott: I think that he has answered that.

Q. Who was that composed of, that 300 people that were [fol. 284] viewing the movie?

What was this audience composed of, Captain, that you saw?

A. I would say slightly more males than females.

Judge McDermott: All right.

Proceed, Mr. Kleinman.

By Mr. Kleinman:

Q. Fact is that stag movie is pretty much dirt for dirt's sake?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: He said what it was, and it is in the record.

Q. With reference to your determination of what are the community standards for obscenity, have you made an investigation of the various book stores, drug stores, and the like as to what is displayed and sold at these places?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection, and let him answer if he knows.

Can you answer, Captain?

A. Yes, sir; we have.

Q. And did you take the result of these investigations [fol 285] of yours into account in determining what the contemporary community standards are as to obscenity?

Judge McDermott: You may answer, Captain Gordon.

A. Yes, sir.

Q. And does the fact that a particular type of matter circulates freely in the community and is purchased freely by various people in book stores and drug stores, do they have any effect in your opinion about what the community standard is as regards obscenity in the community?

Mr. Osborne: I will object, if the Court please.

Judge McDermott: Let him answer if he can, and overrule the objection.

A. I have never decided what the community standard was merely on the circulation of any particular book or magazine, and I have no way of measuring circulation at all.

Q. I am not speaking of circulation, sir.

A. You mentioned what circulation.

Q. I am speaking about the fact that they are available on book shelves and can be bought by anyone that has the price for it, and does this have any effect upon reflecting community standards?

[fol. 286] A. No, sir.

Q. It does not reflect community standards?

A. No, sir, and may reflect the standard of the seller of the magazine or druggist but not what the community standard is.

Q. Are you familiar with the magazine, Playboy?

Mr. Osborne: Objection because of 3767.01 of the Revised Code which says matters having second class mail privileges are not subject to the obscenity statutes of the State of Ohio, and may not be used as a comparison.

Judge McDermott: Sustain the objection.

Mr. Kleinman: If the Court please, I would like to show what the community—what community acceptance as part of the community standard regarding obscenity, and I believe that the courts have held that this is proper matter, and—

Mr. Osborne: I will object again.

Judge McDermott: Sustain the objection again.

Mr. Osborne: Yes, and I represent to the Court that [fol. 287] Playboy magazine has second class mail privileges.

Mr. Kleinman: If the Court please, I will grant that, but the purpose of my examination is that it has nothing to do with it.

Judge McDermott: What is that marked?

Mr. Kleinman: Exhibit A, Defendant's Exhibit A, Playboy magazine, dated January, 1960.

Q. I hand you what has been marked for identification as Defendant's Exhibit A and ask you if you have ever seen this issue of Playboy or any other issue of this magazine?

A. Yes, sir.

Q. Have you seen this magazine on the news stands of Cleveland Heights or the City of Cleveland, Ohio?

A. That issue?

Q. This issue or some other issue of Playboy magazine?

A. Yes, sir.

Q. In Cleveland Heights?

A. Yes, sir.

Q. I will ask you, Captain Gordon, based upon the fact that you consider yourself an average man in the com- [fol. 288] munity and applying contemporary community standards, whether in your opinion this photograph which begins on page 44 of the film appeals to your prurient interests?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Is there an objection now?

Mr. Osborne: We are objecting, your Honor.

(Conference of the three judge panel held at this time.)

Judge McDermott: Court is thinking that it is exempt under the statute, but he is trying to show the level of thinking of a certain community, and on that basis the Court will overrule your objection.

Mr. Osborne: First of all, the magazine presented to the witness is a magazine and not a motion picture film. Second, it is accorded second class mail privileges. Third, it was published in January, 1960, when the issue in this case is the community standard as of November 13, 1959. [fol. 289] Judge McMahon: Proceed, Mr. Osborne.

Mr. Osborne: A comparison by law, a comparison with another piece of literature is not a determining factor on the question of obscenity in this case, and may I—may I refer to 33 American Jurisprudence—page 20; Chapter 9; and Commissioners vs. Buckley, 200 Massachusetts—346; 86 Northeast—910; 22 Law Report Annotated, New Series —225; 128 American State Reports—425.

Applying the theory as set forth in that case to the case in issue now, the holding whether a particular publication,

picture, or other publication is obscene cannot be determined by comparison with standards in established works of art or literature because that which is used for comparison may well be within the inhibitions of the statute. Criminal acts unpunished may not justify other criminal acts.

Judge McDermott: True enough, and the Court will stand on its ruling that it has made so far, and to show the level of certain community thinking, but being mindful of the statute that you quoted, and you may have your ex-
[fol. 290] ception.

Q. I believe that I referred to this exhibit and this photograph on pages 44, 45, 46, or at least the foldout of page 45, and ask you if in your opinion this photograph appeals to the prurient interests?

Mr. Osborne: I will object to the question as being incomplete.

Mr. Kleinman: I will rephrase the question.

Judge McDermott: Objection is sustained.

Q. Based upon the average person in the community and applying contemporary community standards as you understand them, is the dominant theme of this photograph as a whole appeal to the prurient interests?

A. No, sir.

Q. I refer you now to page 62 of the same Defendant's Exhibit A, and in the upper half of page 62 I refer you to a photograph and ask you the same question?

A. Answer is no, sir.

Mr. Kleinman: Will you mark this as Defendant's Exhibit B?

(At this time, Gent magazine, dated February, 1960, was marked for purposes of identification as Defendant's Exhibit B.)

[fol. 291] Mr. Kleinman: Would you mark this as the next exhibit?

(At this time, Rogue Magazine, dated January, 1960, was marked for purposes of identification as Defendant's Exhibit C.)

Mr. Kleinman: Would you mark this as the next exhibit?

(At this time, Cavalier magazine, dated February, 1960, was marked for purposes of identification as Defendant's Exhibit D.)

Mr. Kleinman: Would you mark this as the next exhibit?

(At this time, Sir magazine, dated March, 1960, was marked for purposes of identification as Defendant's Exhibit E.)

Mr. Kleinman: Would you mark this as the next exhibit?

(At this time, the book entitled, Lady Chatterley's Lover, was marked for purposes of identification as Defendant's Exhibit F.)

Mr. Kleinman: Would you mark this as the next exhibit?

(At this time, the book entitled, "The Lovers," was marked for purposes of identification as Defendant's Exhibit G.)

[fol. 292] Mr. Kleinman: May we have a recess at this time?

Judge McDermott: We will take a short recess.

(Recess.)

Following the recess, Captain Gordon resumed the stand, and the following proceedings took place:

Judge McDermott: Mr. Kleinman, ready to resume the cross-examination of Captain Gordon.

Mr. Kleinman: Our exhibits have all been marked now. Would you like me to say what they are or refer to them by exhibit number?

Judge McDermott: As you come to them.

Mr. Kleinman: Defendant's Exhibit B is an issue of Gent magazine for February, 1960.

Judge McDermott: Gent, how do you spell that?

Mr. Kleinman: G-e-n-t.

Judge McDermott: Just like it sounds; all right.

[fol. 293] Q. Referring to pages 34 and 35—

Mr. Kleinman: Do you want to see that?

Mr. Osborne: Please. Thank you.

Q. Referring to page—

Judge McDermott: Date is what?
Mr. Kleinman: Date of the magazine?
Judge McDermott: Yes.
Mr. Kleinman: February, 1960.
Judge McDermott: What is that again?
Mr. Kleinman: February, 1960.
Judge McDermott: All right.

Q. Referring to pages 34 and 35 of the magazine Gent, which has been marked as Defendant's Exhibit B, and with particular reference to the lower picture on page 34 and the left-hand picture on page 35, based upon the average man and the contemporary community standards, would you say that the dominant theme of those pictures as a whole is an appeal to the prurient interests?

Mr. Osborne: Objection on two grounds, and the first one is—

[fol. 294] Judge McDermott: Sustain the objection.

Judge Pincura: Can I amplify that a little. Prime reason for sustaining that is that those publications are not in issue, and three judges have agreed that if you wish to introduce them as evidence which tends to establish the community level, probably I feel the Court will permit that, but the ultimate question from this witness as to the prurient interest, that we will sustain.

Mr. Kleinman: But I will say this:

We want to test the determination, how this determination is made, and he is an expert, and makes them right off the stand by looking at them.

Mr. Osborne: Now, wait—.

Judge Pincura: You are asking him as an average man and not as an expert.

Mr. Kleinman: May I ask him as an expert?

Judge Pincura: No, because that is not for him to decide.

Q. Have you ever seen this magazine on the news stands, [fol. 295] Captain Gordon?

Mr. Osborne: What exhibit?

Mr. Kleinman: This is defendant's Exhibit B.

A. In Cleveland Heights.

Q. Have you seen it in the City of Cleveland?

A. Yes, City of Cleveland.

Q. How about Defendant's Exhibit C, which is the January, 1960, issue of Rogue magazine? Have you seen this on the news stands of the City of Cleveland or City of Cleveland Heights?

A. Yes, sir.

Mr. Osborne: May I see it, please?

Mr. Kleinman: Yes.

Q. Referring now to Defendant's Exhibit D, which is Cavalier magazine, issue of February, 1960, have you seen this magazine on the news stands of the City of Cleveland Heights?

A. Yes.

Q. Have you seen that in Cleveland?

A. Yes.

Q. Referring to Defendant's Exhibit—

Mr. Osborne: Wait just a minute.

[fol. 296] Mr. Kleinman: Yes.

Q. Showing you now what has been marked for purposes of identification as Defendant's Exhibit E, being the March, 1960, issue of the magazine called Sir, have you seen this magazine on the news stands in the City of Cleveland or City of Cleveland Heights?

A. Yes, sir.

Q. Seen it both in Cleveland and Cleveland Heights, Captain?

A. I believe I have.

Q. Are you familiar, then, with the type of magazines which Defendant's Exhibit A to E are—

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. Yes.

Q. You are familiar with these magazines, Captain Gordon?

A. Yes.

Q. Have you examined various issues of these magazines from time to time?

A. On a limited basis, yes.

Q. Isn't it a fact that the dominant feature of these magazines is sex?

[fol. 297] Mr. Osborne: Objection, if the Court please.

Judge McDermott: Pardon?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

Judge McMahon: You may answer.

A. The issues vary from month to month, but presuming that the magazine that you have referred to is those, and past issues as well as present, I would say yes.

Mr. Terrell: Bennet.

Mr. Kleinman: Yes.

(Off the record conference held at this time between Mr. Kleinman and Mr. Terrell out of the hearing of the Court and the court reporter.)

Q. In examining these magazines just briefly from the stand just now, could you tell me—withdraw that question.

The photographs which you looked at in these magazines are photographs by and large of women in the nude or in a state of partial nudity or partially draped, are they not?

[fol. 298] Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overruled.

A. Yes, sir.

Q. Could you tell me what difference there is between the pictures that you observed in these magazines and the motion picture film, "The Lovers," insofar as the question of obscenity is concerned?

Judge McDermott: Yes, sir, I believe that I could.

It wouldn't be necessary.

Judge McMahon: What did you just say?

The Witness: It wouldn't be necessary. He asked me if I wanted to see the magazines.

The picture entitled The Lovers—is based on the complete picture, as I mentioned before, from the map at the beginning of the picture, and starting at the beginning, which

builds the characters of the people that are playing in the pictures, throughout to the end; and by these pictures you call my attention merely to the nudity of persons portrayed in these magazines which seem to lack character, and are [fol. 299] merely pictures of women in the nude, and that doesn't compare with The Lovers, which is surrounded by background.

Q. Do I understand that for the reason that this is a single picture and a flat picture, that that is the distinction between The Lovers and this material that I have exhibited to you?

A. Not for just that reason.

Q. What are the other reasons?

A. In addition to the reason that I mentioned, obscenity of the movie surrounds the complete situation, and portrayal of the individual's capacity of committing adultery, and all acts that are portrayed in the picture, and the completed story as it stands, whereas these magazines are merely flat pictures.

Q. Have you ever seen a flat picture that you thought was obscene?

Mr. Osborne: Objection. I will withdraw the objection.

A. Yes, sir.

Q. How did this differ from the other pictures that you consider to be obscene?

A. Other pictures that I consider to be obscene need no explanation whatsoever, and they are more than just nudes and are nudes portraying circumstances that would lead to [fol. 300] prurient interest.

By Judge McDermott:

Q. Lead to what?

A. Circumstances and actions that would appeal to the prurient interests.

By Mr. Kleinman:

Q. Does that mean that a picture of a nude woman alone would not appeal to the prurient interest under any circumstances?

A. All by itself?

Q. Yes.
A. No, sir.
Q. Have you read Lady Chatterley's Lover?

Mr. Osborne: Objection, if the Court please.
Judge McDermott: Yes or no would not hurt. Have you?
The Witness: No, sir.

Q. Have you seen it displayed on the news stands of the City of Cleveland and the City of Cleveland Heights, Captain?
A. No, sir.
Q. You have not seen it?
[fol. 301] A. No.
Q. Have you ever seen it on the news stands anywhere, Captain?
A. No.
Q. Do you know whether or not it is sold in the City of Cleveland or City of Cleveland Heights?
A. From personal knowledge?
Q. From your personal knowledge.
A. No.
Q. Do you know the story of Lady Chatterley's Lover?

Mr. Osborne: Objection, and he said that he didn't read that.
Judge McDermott: Let the Captain answer.
Judge McMahon: If he knows.
The Witness: I don't know.

Q. Did you see the film, Lady Chatterley's Lover, Captain?
A. No, sir.
Q. Did that film play at the Heights Art Theater to your knowledge?
A. I am not sure.

(At this time there was an off the record conference [fol. 302] between Mr. Terrell and Mr. Kleinman.)

By Mr. Kleinman:

Q. Referring to Defendant's Exhibit G, entitled The Lovers, have you ever seen this on the news stands of the City of Cleveland or the City of Cleveland Heights, Captain?

A. No, sir.

Q. Have you seen it anywhere within the County of Cuyahoga?

A. Yes, sir.

Q. Where have you seen it on the news stands, Captain?

A. I did not see it on the news stands.

Q. Where did you see it in Cuyahoga County, Captain Gordon?

A. Here in the courtroom.

Q. But, before you seen it here, you did not see this book?

A. No.

Q. And you don't know whether it circulates in the county?

A. No, sir; I don't.

Mr. Kleinman: I would like to offer into evidence De-
[fol. 303] fendant's Exhibits A, B, C, D, and E.

Mr. Osborne: Objection.

Judge McDermott: Let us see them, gentlemen.

Mr. Kleinman: Yes.

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time of the five judge panel.)

Judge McDermott: Court is willing to receive these five exhibits, Defendant's A through E, inclusive, for what they are worth, and having in mind the law cited by the prosecutor, and the ultimate questions involved, and for those purposes only they may be received, and you may have your exceptions for the record, Mr. Prosecutor.

Mr. Osborne: May we have the record show that all of those exhibits, those defendant's exhibits A through E inclusive, bear second class mail privileges.

Judge McDermott: Having in mind the law that you stated.

[fol. 304] Mr. Osborne: May the record further show that all of them were not shown to have circulated in Cuyahoga County.

Mr. Kleinman: I don't think that is a correct statement.

Judge McDermott: We have in mind that these magazines are on the news stands after the date of the alleged violation of the law, but it is so close together.

Mr. Osborne: The point I make is that there has been no substantive testimony that each of them have circulated in Cuyahoga County or appeared on the news stands, your Honor.

Judge McDermott: I heard the Captain said in Cleveland Heights, but I don't know if he said in each instance.

Mr. Kleinman: My recollection is that he recognized all of them as circulating in Cleveland Heights.

The Witness: Talking about the magazines?

Judge McDermott: Yes.

Received on the basis set forth, and having in mind the [fol. 305] law that has been cited by the prosecutor.

Mr. Kleinman: I should like to point out to the Court that granting of second class mail privileges does not mean that this matter is not obscene.

Judge Pincura: Judge McDermott indicated that they are admitted for what they are worth.

Judge McDermott: You have had some latitude here.

Mr. Kleinman: Yes, and I appreciate that.

Judge McDermott: We have in mind the ultimate question for this Court to decide.

Q. Captain Gordon, you have testified that on various occasions, either through your own contact with Mr. Jacobellis, or on a contact with him, you observed various motion picture films in a screening prior to their actual showing at the Heights Art Theater?

A. A few.

Q. And you saw, And God Created Woman?

A. Yes.

[fol. 306] Q. What did that film deal with?

Mr. Osborne: I will object.

(Conference of the three judge panel held at this time.)

Judge McDermott: Objection is sustained.

Q. Did that film appear in other theaters to your knowledge than at the Heights Art Theater?

Mr. Osborne: Objection if the Court please.

Judge McDermott: If you can answer that, Captain.

A. I can't answer that with certainty, and I don't know.

Q. You don't know whether the film played anywhere besides the Heights Art Theater?

A. I presume so, but not from personal knowledge.

Q. Do you know whether the film, Lady Chatterley's Lover, played at any theater other than the Heights Art Theater?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Yes, sustain the objection.

[fol. 307] Q. With what does the film, Lady Chatterley's Lover, deal with?

Mr. Osborne: Objection, and he said that he didn't know.

Judge McDermott: Didn't you say that you did not know?

The Witness: Yes.

Judge McDermott: Sustain the objection.

Mr. Kleinman: We have no further questions.

Judge McDermott: Back to the prosecutor.

[fol. 308]

Redirect examination of Captain Earl J. Gordon.

By Mr. Stuplinski:

Q. Captain Gordon, before I begin my redirect examination, in response to one of Mr. Kleinman's first questions, that is, in the first part of his cross-examination, when you were speaking of community standards, you used a word that we did not quite hear, and I wonder if the Court got that, and I think that you said a normal average viewpoint is, or was, and you said a word—of any obscene film. Would you tell me what that word was, Captain Gordon?

A. Condonation—I mean condemnation.

Q. Condemnation of obscene film?

A. Yes.

Q. By the way, Captain Gordon, could you tell us if you belong to any social groups or organizations?

A. Yes, sir.

Q. Tell us what they are, please?

A. Parent-Teachers Association, South Euclid, Ohio, School System.

[fol. 309] Judge McMahon: Please hold your voice up, Captain.

A. Parents-Teachers Association, South Euclid, Ohio, for both the elementary and junior high schools; The Cleveland Crime Clinic Corporation, made up of professional men.

Mr. Terrell: If the Court please, he is not responsive, and the question wasn't asked what they consist of.

Judge McDermott: It doesn't make too much difference, and there is no jury here, and let him answer the question. Go ahead now.

A. Cub Scouts Organization, South Euclid, Ohio, Troop 14; Indian Guide Program, South Euclid—

By Judge McDermott:

Q. Y.M.C.A.?

A. Y.M.C.A.

By Mr. Stuplinski:

Q. Please continue, Captain.

A. Presbyterian Church, Kirkwood and Noble Road, Cleveland Heights, and also some fraternal organizations.

Q. Like the Fraternal Order of Police?

A. Yes, and the F.B.I. National Association.

[fol. 310] Q. And as a result of the membership that you have in these various organizations, do you come in contact with children?

A. Yes, sir.

Q. Do you come in contact with the parents of the children?

A. Yes.

Q. Do you come in contact with elderly people?

A. Yes.

Q. Do you come in contact with both men and women, Captain?

A. Yes.

Q. You mentioned the Presbyterian Church?

A. Yes.

Q. You come in contact with Presbyterians?

A. Yes, sir.

Q. And with other religions, and people that belong to other religious affiliations?

A. Yes, sir; quite often.

Q. And these people come from Cuyahoga County, these groups?

A. Yes, sir.

Q. There was a question that Mr. Kleinman asked you, Captain Gordon, about a matter that took place—a meet-
[fol. 311] ing that took place in your office during the summer of '59.

Do you remember that question being asked of you, Captain?

A. Yes, sir; I do.

Q. And you indicated that there were some women there, and I think three women that were at that meeting in your office, and there was some discussion about setting a community standard; is that right?

A. Yes, that was the question.

Q. And will you explain to us just what the purpose of that meeting was and what was going to take place, Captain?

Mr. Terrell: Objection, if the Court please.

Mr. Osborne: This was raised on cross-examination, if your Honor please.

Judge McDermott: Overruled, in view of some of the questions asked in the cross-examination.

Mr. Stuplinski: Thank you, Judge, and will you answer that question, Captain Gordon?

[fol. 312] The Witness: Will you repeat that question?

Mr. Stuplinski: Mr. Sato, will you repeat the question?

(Question read back at this time.)

A. The purpose of the meeting was to solicit opinions from groups of people throughout the Greater Cleveland Area and to study obscenity in general, coupled with a desire to establish, or, I should say, spell out a community level.

Q. When you say spell out a community level, do I take it that there was to be any writing in that regard?

A. Yes, sir. It was understood in our discussions that we had a community level, but it wasn't placed in writing and spelled out is what I meant by that phrase, and it was the group's desire, if it was possible to do so, to acquaint themselves on their own behalf what the community level was, and place it in writing as a guide for other officers to use in the enforcement of the obscenity statutes.

The purpose of the meeting in my office, they merely came in and asked if we thought this would be of any help to us.

Q. And you used the word "level".

[fol. 313] Q. Do you have a synonym for the word "level"?

A. I am referring to the level, contemporary level of the community standard in reference to obscenity.

Q. Now, do you have an idea, or was it told to you, how this was going to take place?

A. There was some suggestion on what they intended to do.

Q. Will you tell us what they are?

Mr. Terrell: Hold on, and that is hearsay, if the Court please.

Mr. Osborne: You brought that out.

Mr. Terrell: We will withdraw the objection.

Judge McDermott: They withdrew that, and go ahead.

Q. Do you know what I asked?

Mr. Kleinman: May I have the last question?

Judge McDermott: Yes, will you repeat it, Mr. Sato.

The Witness: I would like to have it, too.

(Question read back.)

[fol. 314] Q. Referring to the suggestions?

A. Yes.

One suggestion was to get into a discussion of obscenity,

and get into a discussion of pornography, beginning at either level, whether it be family level or pornographic, and study the issues, whether they be publications or movies, or what have you, and decide by use of examples, rather than definitions, where the contemporary community standard of the vicinity existed.

Q. Is that your answer?

A. Yes, sir.

Q. All right.

Now, Captain Gordon, you were asked about the various terms that—withdraw that.

Captain, you were asked about the various themes that you thought the picture had, and we are speaking about the motion picture, "The Lovers," and you mentioned sex, adultery, abandonment, and unnatural sex act, and disregard for property; and I will ask you to confine yourself strictly to the subject or theme of sex, and describe for us as best you can in detail the various bits of acting that took place on the screen referring to sex or suggestive sex?

A. The picture—as I recall it, the conversation that the [fol. 315] wife of the publisher had with her girl friend in Paris as they discussed the degree of—whether she was in love with this man, referring to the polo player, not her husband, indicated that they were considering affection at this time, and followed by the visit to the polo grounds by the woman, and we will refer to her as the woman in the play, where she meets him while he was still riding a horse, and she placed her cheek on his thigh, and they hold hands briefly, and they passed compliments toward each other; and he asked if you still love me, and followed by more conversation with her girl friend, indicating that she looked well when she was in love.

And then when she returned home from one of these visits to Paris—from Paris—her husband threw a few digs and mentioned a few remarks to her concerning her company with another man, and this was followed by her desire to return to Paris.

She did, prior to going back to Paris for another trip, follow her husband to the publication building, where he shunned her somewhat because of his duties, and he was busy; and the evening was climaxed by an argument con-

cerning her opinion about this man that she was keeping company with, and not her husband, but the polo player, [fol. 316] particularly, and further discussion as to what her husband attempted to do when he made a formal invitation for this polo player to spend the weekend, or the evening, at their estate. And then there was the—

Q. Let me interrupt and ask this question:

In your cross-examination you specifically mentioned that there were certain scenes with the archeologist, for instance, in the yard?

A. Yes.

Q. Will you describe that for us as suggestive sex, Captain?

A. Yes, sir.

Q. Go ahead.

A. After changing into a somewhat transparent nightie, robe, this was in the bedroom, she went down into the room where the archeologist had been listening to a recording machine; and, after looking out upon the moonlit estate, she decided to take a walk, and was approached by the archeologist outside, and they meet quite abruptly, and then she turned in some manner to more or less avoid him and walked away, and he followed; and, during this time, when they stopped, they gazed in each other's eyes suggestively, and he followed her again when it appeared that [fol. 317] she may want to avoid him, and to where the waterfalls were, each of them carrying a drink.

Upon setting the drinks down the conversation related to each of the domestic problems, and they were discussing problems at this time, and they again gazed at each other in a suggestive way, and put the drinks down and held hands.

Then, she motioned him to follow her as she led him through the woods down through the stream where they stopped on the bridge and held each other very closely at that time.

Q. Captain, let me interrupt.

A. Yes.

Q. You mentioned that they held hands near the waterfall?

A. Yes.

Q. How did that have any suggestion of sex, the holding of their hands?

Describe that for us?

A. Well, there was an indication of affection as adverse to scorn, which she had displayed just prior to this. She at first mentioned and showed that she would rather avoid him by her remarks, and minutes later, after gazing into [fol. 318] each other's eyes under this moonlight and a soft breeze blowing into her hair, she dropped her restraint and laid her glasses down, and they grasped hands.

Q. Now, referring to the boat, rowboat, what scenes there in or near the rowboat suggested anything of sex, Captain?

A. Well, embracing just prior very tightly, before getting into the boat, at which time we see her assuming a somewhat lying position on the—

Q. What position?

A. Lying down position.

Q. In what manner?

A. She was looking at the boat forward, and I am not a Navy man, but to the left side of the boat at that time.

Q. Was she in the boat?

A. She was in the boat, and she got into the boat and laid down, and then the archeologist got into the boat and laid down partially on top and against her.

Q. Was she laying face up?

A. On an angle, half up and half toward him, and he laid with his partial body over her chest, and his arms over her chest.

[fol. 319] Q. And then what happened?

A. As the boat started to drift, apparently downstream, they began passionate embraces.

Q. Let me ask you—

A. Abruptly, the scene changes.

Q. Let me ask you this before you go on, Captain Gordon.

A. Yes.

Q. What was the condition of her clothing when she got into the boat?

A. I observed in one part as she entered the boat the night dress that she was wearing was buttoned up to the top, completely buttoned, and it was so after she got into the boat and laid down. However, as she stepped out of the

boat and they went down this dark stream covered with trees and moonlight—and they disappeared into the darkness—and when they got out of the boat I observed that this time she was on the opposite side of the boat, and apparently they had changed positions in the boat, and the top button or two of her dress were unopened and open.

Q. Now, you say that there was a change of scenes while they are in the boat?

A. Yes.

[fol. 320] Q. Will you explain that?

A. It portrays the boat, a very closeup view of the two lovers lying in the front of the boat embracing. As the boat emerges under the tree limbs, casting a shadow, it is blanked out.

There is fine music in the background with the tempo of the music starting at this time to build up in volume and intensity, and starts to build up as it continues on throughout the good portion of this last reel.

Q. In that particular change of scene in the boat, what was the state of passion, and was there any change in passion between the first and second scene?

Mr. Terrell: Objection, and that calls for a conclusion.

(Conference held among the three judge panel.)

Judge McDermott: Yes, the word passion should be struck from the question, the Court feels, and that is his conclusion.

Q. Tell me this, Captain Gordon, what was the situation between these two people just before they disappeared from view on the river under the trees, and from the next scene on the boat?

[fol. 321] A. When they got out of the boat, the scene appeared much more passionate.

Mr. Terrell: I move that go out, and—

Judge McDermott: Yes, strike that out as his conclusion, and he dare not say that.

Q. Now, Captain Gordon—

Judge McDermott: The Court will disregard that.

Q. The next scene that you mentioned to Mr. Kleinman as he examined you was the bedroom scene, and will you tell us what took place in the bedroom with reference to sex?

A. After leaving her young daughter's room?

Q. Talking now about the bedroom.

A. Yes.

Q. Go ahead, Captain.

A. They embrace very passionately, during which she stops the clock from ticking, and the music and tempo begins to grow in intensity as it did before, and in somewhat of a frenzy she starts to remove his clothing.

Simultaneously, he begins to remove her robe, and her robe is dropped from her shoulders and apparently to the [fol. 322] floor.

Mr. Terrell: If the Court please—

Judge McDermott: Court will disregard that, "apparently to the floor," and strike that out of the record.

A. As he removed her robe from her shoulders and they embrace in this nude position he—

Mr. Terrell: If the Court please, I object because unless he saw a different picture than what I saw—

Mr. Osborne: Now, please—

Mr. Kleinman: He is describing a picture that everyone has seen.

Judge McDermott: Disregard what Mr. Terrell said, and the Court has seen the picture.

Mr. Terrell: But there is no nudity, and I entered my objection concerning nudity.

Judge McDermott: It is for the Court to say what we saw concerning all the evidence in order to determine the answer to the ultimate question, which we will do at the [fol. 323] end. The Court will do that.

Q. Captain, you were saying that he removed her robe, I think that you called it?

A. Yes, sir.

Q. Yes, go ahead.

A. He removed her robe and slipped down the shoulder straps of her nightie which disappeared from view as far as I could see, and then he pushed her back somewhat with her assistance onto the bed, and that was apparently merely

a step or two from them when they started to disrobe, and he then assumed a position on top of this woman.

He then began kissing and hugging her, during which time I must say that the momentum and intensity and tempo of the background music started to increase, and he withdrew his kisses from the neck and face area, and slowly went down her body, stopping at her breasts which were exposed; and then as he continued down her body, approximately half-way, merely his hair line shows, during which time she was uttering as near as I could remember—I think it was—

Judge McDermott: Amour?

The Witness: I believe that it was amour, and the sub-[fol. 324] title was love, and the tempo of this music background is gaining in intensity, at which time she starts to move and swinging her head from side to side, displaying great emotion, great delight, and she calls for him to grab her hand, and his hand comes up over the side of the bed, fingers facing her body, and reaches her hand, and there is a squeezing of the hand, and a very closeup view of the hand, during which she repeats a certain French word which I don't know, and which I don't understand.

Q. Captain Gordon, after he kisses her, and you say that his face goes down to her breasts and below her breasts, from that moment on until the hand clasp, do you see any other part of the body besides his hand?

Mr. Terrell: Objection, and leading the witness.

Judge McDermott: Sustain the objection, and you are leading him.

He must tell what he saw and not have you lead him.

Q. Now, Captain Gordon, will you briefly go over any other scenes suggesting sex after the handclasp?

[fol. 325] A. Following the build up of this particular scene on the bed that I discussed, with the music increasing, it suddenly dies down, and there is conversation, where she is laying under a blanket, exposing a great deal of nudity, indicating that neither had any clothes on at that time.

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Strike that out, and the Court will disregard that, from indicating on.

Q. Did they leave the bed sometime after that?

Mr. Terrell: Leading again, your Honor.
Judge McDermott: Yes.

Q. Tell us what happened next?

A. From the part of their bodies that was exposed under the blanket, basically from the hips up, there was no clothing visible on either of the two participants, after which she got up and ran to the bathroom, and climbed into a tub of water.

She was lying in the bathtub filled with water when he got up and followed her into the bathroom.

Q. What happened after he got into the bathtub, Captain? [fol. 326] A. He climbed into the bathtub with her facing him at the time.

Q. What did they do, if anything, in the bathtub?

A. They soaked in the bathtub as far as I could tell.

Q. Anything else that you saw besides soaking in the bathtub?

A. No, sir.

Q. How did he lay in the tub?

Judge McDermott: That is an observation.

A. She was lying in a semi sitting position in the tub with her back against the rim of the tub, and he approached her from where the faucets were and where her feet were, and he climbed into the tub, and he laid down at an angle position facing her, his feet submerged in the water.

Q. They eventually leave the bathtub, do they, Captain Gordon?

A. Yes, sir.

Q. Where did they go then?

A. Where?

Q. Yes.

A. Back to their bathroom or bedroom they went after that.

[fol. 327] Q. What took place in the bedroom next?

A. Next scene was that they were in bed, and she is writing signs on his nude back, which is exposed at the time.

Mr. Stupinski: All right; I have no further questions.

Judge McDermott: All right, gentlemen, anything further?

[fol. 341] Thursday, May 26, 1960, at the hour of 9:15 A.M.

Judge McDermott: Good morning, gentlemen. Are you ready to proceed?

Mr. Osborne: The State will call Mr. Ward Marsh.

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called as a witness MR. WARD MARSH, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Mr. Ward Marsh.

By Mr. Osborne:

Q. Would you tell us your name, sir?
A. Ward Marsh.
Q. Where do you live?
A. My home is in Hudson, Ohio.
Q. Hudson?
A. Yes; Hudson, Ohio.
Q. What is your business or occupation?
A. Film critic of the Plain Dealer.
[fol. 342] Q. And the Cleveland Plain Dealer, is that a Cleveland morning newspaper?
A. Yes.
Q. Is it the only Cleveland morning newspaper?
A. So far as I know.
Q. What is the circulation, generally, of the Cleveland Plain Dealer?
A. I think it is somewhat over 300,000 a day, and that is daily, and somewhat over half a million on Sundays, but the exact figures I can't give you.
Q. All right.
And is the Cleveland Plain Dealer circulated throughout Cuyahoga County?
A. I think probably circulated throughout the world.
Q. But specifically, is it circulated throughout Cuyahoga County?
A. Yes.

Q. You have mentioned that you are the movie critic for the Cleveland Plain Dealer?

A. Yes.

Q. How long have you held that position?

A. 41 years this September.

Q. 41 years this September?

A. Yes.

Q. And, sir, how long have you been connected with or [fol. 343] resided in, or worked, in Cuyahoga County?

A. I have worked here all of that time, but I was with Western Reserve University, and came up to Western Reserve in 1912 or 1913, and I can't give you the exact date, but it was somewhere in 1912 or in 1913.

Q. And you have been here consistently since that time?

A. That is right.

Q. Now, as movie critic, would you mind stating what your functions and duties and responsibilities are, Mr. Marsh?

A. My work is to see the new pictures that come in and report my opinion on each new picture.

Q. And in connection with your duties, sir, are you in contact with persons holding like positions in other cities of the United States?

A. Well, only briefly I see them from time to time, and I should add that in addition to writing opinions on pictures that come in, that I do have a column, and if there is not a new picture I write a column that might be classified almost as an editorial column on motion pictures.

Q. Are you acquainted with the works and publications and articles of other motion picture critics throughout the [fol. 344] country?

A. I would not say throughout, but I know pr ably the top ones.

Q. All right.

Would you name some of the top ones that you refer to?

A. Well, I would name Harold Cohn of the Pittsburgh Post Gazette; J. Carmody of the Washington Star, and I only see that occasionally; Phil. Sharon of Los Angeles; Bosley Crowther, whom I met occasionally, of the New York Times; Caspar Mooneyhan of the Pittsburgh paper, which is also a daily and a Sunday paper.

There are many others, and I can't name them just now.

Q. I see.

Are you acquainted with Robert Mooney of the Cleveland Press, an afternoon newspaper here?

Mr. Stuplinski: That is Paul Mooney.

Mr. Osborne: Pardon me.

Q. Paul Mooney of the Cleveland Press?

A. Yes, I was going to say—not much more than slightly because he hasn't been on the job very long, and I have had more contact with Stan. Anderson, because Anderson is usually the reviewer, and when Anderson is away Mooney [fol. 345] does the reviewing.

Q. I see.

Are you acquainted with Henry Hart, editor of Films in Review, and I am referring to State's Exhibit 5?

A. I should say quite well.

Q. Who is Henry Hart, outside of his being the editor of Films in Review?

A. He has been connected with the National Board of Reviews for a long time, and the National Board of Reviews narrowed down its existence, and Henry Hart took over the magazine and made a very credible magazine out of that, and perhaps one of the best in the world, and certainly one of the best in the United States.

Q. Where is that published?

Mr. Kleinman: Objection to that remark as being a conclusion of the witness, that it is one of the best in the United States, your Honor.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection.

The Witness: May I answer that, your Honors?

[fol. 346] Judge McDermott: Yes, answer that, Mr. Marsh.

A. In New York City.

Q. Could you give us an approximation as to the number of films that you have reviewed for the Cleveland Plain Dealer in, let us say, within the past five years, Mr. Marsh?

A. Oh, in the past five years I could guess—it would be

between 500 and 1,500; and I would have to take that position because I don't know exactly.

Q. When you review a film, or view a film, and write a review, generally speaking, from what angles are you viewing and reviewing the film?

A. The angles of the reviewing of a film is the quality of entertainment in it, and that is the chief function of a motion picture, and that is entertainment, and I think that I do look at it from the entertainment standpoint.

A good many pictures in the last few years also have carried messages—hidden, concealed, but the messages are there that the audience can get and will accept if it is covered by enough entertainment.

Q. And do you review it from a dramatic point of view, if I am using the term correctly?

[fol. 347] A. Yes, I try to, and many angles—and camera work and lighting, and so many different phases of it that it is a little difficult to say how many different angles there are.

Q. Now, sir, did you have occasion to view the movie entitled "The Lovers," and, in French, I believe, "Les Amants"?

A. I did.

Q. Approximately when did you view that film?

A. Last November.

Q. And where was that, sir, if you recall?

A. At the usual place where most of the new pictures are seen, and, that is, if we get a preview of them, in the Twentieth Century Fox screening room on Payne Avenue, and I don't know the exact number, but it is next door to the Sidney Hillman Labor Building.

Q. Would that be 2219 Payne?

A. I would guess that.

Q. But it is in that neighborhood?

A. Yes, in that neighborhood.

Q. I hand you what has been marked for purposes of identification as State's Exhibit 8, which is an issue of the Cleveland Plain Dealer, Friday morning, November 13th, and refer to, specifically, to Page 36 which is marked as State's Exhibit 8-A.

[fol. 348] Q. Would you look at that, sir?

A. Yes.

Judge McMahon: November 13th of what year?

Mr. Osborne: 1959, and thank you, Judge.

Mr. Terrell: What date again, Tom?

Mr. Osborne: November 13th.

Mr. Terrell: Thank you.

Q. Now, sir, can you identify what appears in the upper lefthand corner of State's Exhibit 8-A?

A. It is headed on the story which I wrote, and in capital letters:

"Adventure in Filth."

Q. Thank you, sir.

Is that a review that you wrote?

A. Yes.

Q. And you wrote that after seeing "The Lovers"?

A. Yes, that is right.

Q. Now, sir, do you have an opinion of that film from a dramatic, artistic, and literary point of view?

A. My opinion is unchanged from what it was in that review.

[fol. 349] Q. All right.

Now, sir, since the review may not testify, will you tell us what your opinion is?

A. I thought that it was dull up to—I should say the last reel, and I don't know exactly whether that would be correct, but it was the last reel that had something I had never seen on the screen before.

Q. What was that which you had not seen before, Mr. Marsh?

A. That was the part that I thought, felt, would be sexually exciting, particularly to individuals between ages 18 and 25.

Mr. Kleinman: Objection to that question. Objection to that answer.

(Conference of the three judge panel held at this time.)

Judge McDermott: That is his opinion, and we feel that it should stand.

Q. Now, sir, you said especially to individuals between 18 and 25?

A. Yes.

I will—

Q. Now, do you have an opinion as to whether or not it would have an effect on other individuals, outside of the categories between 18 and 25?

[fol. 350] Mr. Kleinman: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: Objection is overruled. You may answer.

The Witness: I am sorry, and I did not hear that.

Judge McDermott: You may answer the question, Mr. Marsh.

A. Yes, because I found it myself that way, at my age.

Q. And what effect would you say, sir, it would have upon individuals between 18 and 25, and individuals outside of that range?

Mr. Kleinman: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overruled, and this is his opinion.

A. I think if you get them young enough they won't know what it means, and perhaps you can get them within that age bracket, and they might not know what it means, but something happens, and I believe that in Hollywood they call that chemistry.

Q. And what is that?

[fol. 351] A. Sex, and I felt when I saw it that in writing a review as I did of it, that there were need of voicing my opinion of what I thought of the picture and of that particular portion of it.

Q. And you say, sir, that your opinion today is as it was at the time that you wrote the review?

A. That is right.

Q. Will you tell us that opinion more in detail, sir, as a movie critic?

A. Little difficult to word, and much easier to sit in front of a typewriter and give an answer directly on it.

Q. Sir, would you care to use State's Exhibit 8-A to refresh your recollection?

Mr. Kleinman: Objection, if the Court please.

The Witness: I don't think that I need to have my recollection refreshed because I probably will never forget that, because I have never before seen something like that; and I am not one who has ever looked at a stag picture; and my memory of everything on the motion picture screen goes back to 1914, and there was a motion picture with Audrey Munson at that time when she was garbed in a very thin [fol. 352] veil, and completely nude otherwise, but that wasn't exciting from the standpoint that I have mentioned in that review, and that wasn't exciting sexually, and it was an attempt to make an art picture with Audrey Munson; and, if this was an attempt to make an art picture, I missed it.

Q. You are talking about "The Lovers"?

A. Yes.

And this was something that to me—due to the movement and due to the pictures that were shown, and due to everything that happened in the picture, even when your imagination filled in certain things that weren't there, was sexually exciting.

Q. Could you get to specifics, Mr. Marsh, and point out these things that led to the conclusions that you testified to, as to those things that are sexually stimulating?

Mr. Terrell: Objection, and we are dealing with the prurient interests and not sexually stimulating, and they are not synonymous.

Judge McDermott: Just a moment.

(Conference of the three judge panel held at this time.)

Judge McDermott: Do you have the question, Mr. Marsh? [fol. 353] The Witness: Beg pardon. Yes, but I would prefer not to answer that so long as there are ladies present in the court, sir.

Judge McDermott: There are three ladies here, and one is a reporter, I take it.

The Witness: My very good friend, Elsie Loeb, I would not offend in the world.

Miss Loeb: I did not hear that, Judge.

Judge McDermott: He said he wouldn't offend you for the world.

(Conference of the three judge panel held at this time.)

Judge McDermott: I think it is fair, and it is a public courtroom, but the Court has certain authority.

I think that is fair enough for the ladies and Mr. Marsh, certainly.

Mr. Terrell: May we have your ruling on our motion, your Honor?

Judge McDermott: We overruled your motion.

Mr. Terrell: May I have the question again?

[fol. 354] Judge McDermott: Read that question again, Mr. Sato.

(Question read back at this time.)

The Witness: I would like to have read that again, please.

Judge McDermott: Read that again, please, Mr. Sato, and give him a chance now.

(Question read back.)

Judge McDermott: Is that too long a question?

The Witness: I can answer that question.

Mr. Osborne: Will you tell me what Terrell moved after that?

(Mr. Terrell's remarks read back to Mr. Osborne at this time.)

Judge McDermott: Now, will you read the question once more, Mr. Sato?

(Question read back again at this time to the witness.)

The Witness: May I ask if your Honors have seen the picture?

Judge McDermott: Yes; all three of us.

[fol. 355] (At this time the three ladies that were present in the courtroom left the courtroom.)

Q. Will you answer the question, please?

A. The scenes that I refer to—I have no objection to the scenes in the garden or in the boat because there is nothing shown there, and merely suggestive, and not suggestive so far as I was concerned, nor do I think that there was anything wrong with her coming in and kissing the child goodnight if she had gone in the bedroom alone, but when she went into the child's bedroom, and the man was stripped to the waist, and she came over covered by a bathrobe, and that dropped from her shoulder, quite obviously suggesting that she was naked, and when she moved back on the bed, and you saw her body as it was shown from the camera, and he bent over her and then he went out of sight, and obviously an abnormal act was performed because her left hand, as I remember, was extended out, and showed you that she obviously had an orgasm, and in all of those scenes, they are the ones which stirred me against The Lovers, and made me feel that it wasn't fit for a general public audience.

Q. Now, Mr. Marsh—

[fol. 356] The Witness: Unless the questioner has something more that will be of the same sort, the ladies can come back in, but it was the one word that I wanted to use that I did not want the ladies to hear.

Judge McDermott: The cross-examiner will undoubtedly go into this.

Mr. Terrell: Let the record show that this man is not cross-examining, but he is direct examining.

Mr. Kleinman: I don't think that you understood the Judge.

Judge McDermott: Didn't you hear me? I said that undoubtedly the cross-examiner will go into this whole thing later on cross-examination, and I would take it that you would.

Mr. Kleinman: Yes, sir.

Q. Sir, can you tell us what is the essence of drama?

A. Well, there are many, many books written on that.

subject, and would take an entire book to answer the question, but drama is conflict.

Q. From a dramatic point of view, sir, did you find a conflict in this film?

A. Not as much as I expected, and I also found that instead of being surprised—when she was picked up on [fol. 357] the road by the archeologist, I found that it seemed to me a dramatic signpost that was posted—and I think I should explain that in every audience you will find some man says and some woman says:

"I told you that."

But something would happen before this particular thing about something that was going to happen, so that this person had gone along and followed along that guidepost light, and he or she was happy to find that he or she was right, and what had been set up before that was a guidepost to that show.

However, there was nothing set up, so far as I could see, in The Lovers, and I expected something to happen with the polo player because he was distinctly the lover, or had been the lover, and I don't know but she might have been his mistress so far, but there was nothing to suggest that; and so far as the husband was concerned he was very indifferent toward his wife, and neither had any affection for each other.

Q. Is it true, sir, that the signposts that had been set up pointed toward the polo player?

A. That is right.

Q. And in what respect was that violated or not followed through?

A. Well, it just never happened, and she was picked up, [fol. 358] and her car broke down, and she was picked up on the road by the archeologist.

Q. From a dramatic point of view, would you say that the picture, "The Lovers," was dramatically good or dramatically not good?

A. Actually, all that had happened even up to that point, even if the dramatic signposts had been followed through, I thought was dull.

Q. I see.

I wish to exhibit to you, sir, certain defense exhibits—withdraw that.

I exhibit to you Defense Exhibits A, B, C, D, and E, and call your attention with reference to Pages 44 and 45 of Defense Exhibit A.

Would you look at that please?

Mr. Osborne: Are there any other specific pages in that?

Mr. Kleinman: No.

Q. And State's Exhibit B—rather, Defense Exhibit B, pages 34 and 35, and to exhibit to you in the other defense exhibits, C, D, and E the various pictures of nudes and semi-nudes.

Do you see them, sir?

A. Yes.

Q. All right.

[fol. 359] Q. Now, and for the record I might say the pictures of nude women or semi-nude women.

Mr. Marsh, can you tell us as a critic, is there a difference of effect, or impact, between the picture of a nude woman, or semi-nude woman, a still picture, and that of a motion picture, such as "The Lovers"?

Mr. Kleinman: Objection.

(Conference held at this time of the three judge panel.)

Judge McDermott: Overrule the objection, and the answer may be given.

Mr. Kleinman: Save our exception, if the Court please.

Judge McDermott: We feel that professionally he is making a comparison, and he has the right.

The Witness: The only answer is that I don't think that this is art, and I don't know the magazines, and I don't buy them, and some of them, I think, are practically something that will appeal to someone or they would not print that, but some of the most beautiful work of art are nudes, not only in pictures but in statues, and it is only when [fol. 360] motion enters that the excitement occurs.

Q. And was there motion in the movie, "The Lovers"?

A. There was motion in "The Lovers".

May I add to that, that sometimes it is left to the imagination where nothing is shown, but merely suggested by the

imagination, and there is no such feeling or no such steering of the baser impulses as you get from "The Lovers".

Q. I see.

Mr. Terrell: I move that go out as not responsive to the question, your Honor.

Judge McDermott: Overruled.

Mr. Terrell: Exception.

Q. Now, the picture, "The Lovers," state whether or not that was the first picture of its kind that you have ever seen?

Mr. Kleinman: Objection to "of its kind".

That is a broad question, your Honors.

Mr. Osborne: I will withdraw that question.

(Conference of the three judge panel held at this time.)

[fol. 361] Judge McDermott: The answer is in the record prior to this, and the prosecutor has withdrawn it now, and so it isn't with us at this time.

Q. From an artistic point of view, Mr. Marsh, would you say that the movie, "The Lovers," ranks as a work of motion picture art?

Mr. Terrell: Calls for a conclusion, your Honors.

(Conference of the three judge panel held at this time.)

Judge McDermott: Read the question, please, Mr. Sato.

(Question read back.)

(Conference of the three judge panel held at this time.)

Judge McDermott: He was asked exactly the same question a little bit ago, and he answered that.

Mr. Osborne: I will withdraw that, and I don't mean to repeat, your Honors.

Q. Mr. Marsh—for the record, I am making reference now to State's Exhibit 12 and 12-A, page 56, which is a copy of the Cleveland Press for November 11, '59, with specific reference to page 56.

Are you—pardon me—

[fol. 362] (Conference held at this time between Mr. Osborne and Mr. Stuplinski.)

Mr. Osborne: We don't have it in the courtroom at the present time because it is being photographed, to be substituted for one of the bound volumes, and it was testified to the other day.

Q. Mr. Marsh, I ask you whether or not you agree with Mr. Paul Mooney's statement in the Press on November 11, '59?

A. Cleveland Press?

Mr. Kleinman: If the Court please, I will object to this line of questioning, and this is not cross-examination.

Judge McDermott: Let him finish his question.

Q. Do you agree with his statement when referring to the candid camera work in the movie, "The Lovers"? He said:

"It makes the second-rate French offering controversial and moreover wholly objectionable as far as common decency is concerned."

Mr. Kleinman: Objection, and I object to the question and ask that be stricken from the record.

[fol. 363] (Conference of the three judge panel held at this time.)

Judge McDermott: Objection will be sustained. Mr. Marsh may give his own opinion though.

Q. Are you acquainted, sir, with the review by Henry Hart, editor of Films in Review, as appears in the November, '59, issue of Films in Review, and I direct your attention in this connection to State's Exhibit 5-A and 5-B, pages 561 and 562 of State's Exhibit 5?

Mr. Kleinman: If the Court please, I should like to enter an objection at this time to the reading of the statements into the record, which are not proper.

Q. My question is, are you acquainted with that, Mr. Marsh?

Judge McDermott: Mr. Marsh may answer, yes or no.

The Witness: Let me say this:

I was acquainted with that, but to ask me to quote any part of that, I could not do that.

Q. But the question is, are you acquainted with these?

[fol. 364] Mr. Kleinman: Objection, your Honor.

Judge McDermott: Overrule the objection and say, yes or no.

A. I have read it, but I cannot quote any part of it at this time.

Q. Did you read it earlier today?

A. Yes, I read it earlier today, but not with sufficient thought given to the story.

I have great respect for Henry Hart, but I did not read it with sufficient thought to remember any part of what was in it.

Mr. Terrell: Wait a minute, and he is not going to go in through the back door when he can't go in through the front door.

(Conference held at this time of the three judge panel.)

Judge McDermott: Read the answer again, Mr. Sato.

(Answer read back at this time.)

Mr. Kleinman: I ask that remark may be stricken out.

(Conference of the panel of the three judges held at this time.)

[fol. 365] Judge McDermott: The last part of that remark will be stricken from the record, and the Court will disregard that.

Q. Are you going to read that to yourself now?

Mr. Terrell: Objection, and will the Court permit that?

Judge Pincura: Depends on what the next question is.

Judge McDermott: Let him read that to himself, and overrule the objection.

What exhibit is that?

Mr. Osborne: That is State's Exhibit 5 and 5-A.

Judge McDermott: It hasn't been offered in evidence yet.

Judge Pincura: It has only been identified.
Mr. Osborne: That is right, your Honors.

Q. Sir, are you in agreement with that review that you have just read?

Mr. Terrell: Objection.
Mr. Kleinman: Objection.

(Conference held at this time of the panel of three judges.)

[fol. 366] Judge McDermott: Sustain the objection.
Mr. Kleinman, I respectfully ask you to take your chair. I don't mean to be rude, but it is better for the examiner and better for the Court and jury.
Mr. Kleinman: Right.
Judge McDermott: Thank you.

Q. Are you acquainted with the defendant, Nico Jacobellis?
A. Yes.
Q. How long have you known him?
A. Well, I knew Nico, I should say, some five to six years before he became manager of the Heights Art Theater.
Perhaps it is longer than that, and I can't give you the exact date.
Q. And you have known him throughout that time?
A. Yes, I have known him throughout that time, and I know how interested he is in motion pictures.
Q. And you are testifying under subpoena here; is that right?
A. That is right.

Mr. Osborne: I have no further questions of this witness.
[fol. 367] I just thought of something. May I have a moment, your Honor.
Judge McDermott: Yes. Take your time, Mr. Prosecutor.

(Conference held at this time between Mr. Osborne and Mr. Stuplinski.)

Mr. Osborne: That will be all of this witness, your Honor.

Thank you.

Judge McDermott: Now, gentlemen, the other side.

[fol. 368] Cross examination of Mr. Ward Marsh.

By Mr. Kleinman:

Q. Mr. Marsh, the column that you write for the Cleveland Plain Dealer is a column containing your personal opinion with reference to movies that you view. Is that correct?

A. That is right.

Q. You have stated that you see somewhere between 500 and 600 films, or thereabouts, during the past five years?

A. That is only a guess, and I haven't—I have seen all of the first runs that have been in town.

Q. Did you see the film "Ecstasy" with Hedy LaMarr?

A. I saw the film "Ecstasy" when it first came in, and it had been so chewed up that it meant very little, and our own State Department had taken a good deal out of it, and I saw parts of it, and I saw it, and I know that parts of it were taken out.

Q. I asked you if you saw the film, "Ecstasy," Mr. Marsh?

A. I did.

Q. Did you see nude scenes in Equity—in "Ecstasy"?

A. I saw her running through the woods and saw her [fol. 369] back, but nothing that stands out in my mind after all of these years that I would say—I can't answer your question because I am giving you an opinion which is a motion picture critic's opinion, that you don't want.

Q. Did you see the scene in which Hedy LaMarr—the star's face is shown during a passionate moment?

A. I can't remember, and I can't answer that question now.

Q. Do you recall that such a scene was in the picture?

A. I don't remember.

Q. I believe that you have stated that you never saw a stag movie; is that correct?

A. That is correct.

Q. Now—

Mr. Kleinman: What page is that exhibit?
Mr. Osborne: There it is.

Q. Referring to State's Exhibit 8-A, page 36 of State's Exhibit 8, would you read for the Court the first two paragraphs of your review of that day?

"When I began this business of looking seriously at motion pictures, I never dreamed that I would have to review a stag movie, and this is my first review of such a picture, [fol. 370] and the first of its kind I have ever seen. I lay no claim to purity. At the same time, I want no part of filth, least of all on the motion picture screen."

Q. Now, this is the review that you wrote of "The Lovers" on that date?

A. Yes.

Q. And you referred to a stag movie; is that correct, Mr. Marsh?

A. Yes.

Q. But, yet, you have never seen a stag movie; is that correct?

A. That is correct, and I heard about them.

Q. What have you heard about stag movies?

Mr. Osborne: Objection, if the Court please.
Judge McDermott: Objection is overruled.
You may answer the question, Mr. Marsh.

A. I had heard about them from—but I can't give you his name, but a man in the Film Building who was sentenced for possessing stag movies, and showing them, and I had been told what they are.

[fol. 371] Q. What were you told, Mr. Marsh about what a stag movie was?

Mr. Osborne: Objection, and that is hearsay.

Judge McDermott: The ladies will have to wait until he is finished.

A. Pictures of the actual intercourse.

Q. Showing the actual act of intercourse?

A. That is right.

Q. Were you told whether or not they show the genitalia in the actual intercourse?

Mr. Osborne: Objection to that, your Honor.

Judge McDermott: That is hearsay evidence, and that is strictly objectionable; yes.

Mr. Kleinman: But if the Court please, I am testing his own review.

Mr. Osborne: I will withdraw the objection.

Judge McDermott: The way that you asked that it would be hearsay, and my notion was to let that go, but they have withdrawn their objection, so go ahead.

Judge McMahon: May I have the question, Mr. Re-
[fol. 372] porter, please?

(Question read back to the Court at this time.)

A. I don't think any report to me was ever given so vividly that they had to tell me anything about whether or not there was any satisfaction either on the part of the man or the woman, but mere mention of the fact that there was intercourse shown in this picture was all that I had.

Q. Well, was intercourse shown in The Lovers?

A. That is what I said I felt was the abnormal part of it, and I don't think that it was shown, but I did think from what I saw of the woman—and if I have to bare my own private life here, I would say that it was a picture of a woman either simulating or actually having an orgasm.

Q. This is your impression of that scene?

A. Yes.

Q. But you did not see any part of the body below the waist; did you?

A. I did not.

Q. Well, in your judgment as an expert on the motion picture film, could someone get a different impression of what was going on at that time?

A. You are asking me something I can't answer, be-
[fol. 373] cause I don't know what somebody else is going to get.

Q. Are you saying, Mr. Marsh, that the actual act of intercourse took place in that scene?

A. There is—what should you call that—so-called French version.

Q. Are you saying that an act of intercourse or an act of perversion actually and physically occurred, Mr. Marsh?

A. Only what was actually pictured, and the woman gave the impression that she either had or simulated an orgasm.

Q. This was your impression, and that is what you saw, Mr. Ward?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Sustained, and you are arguing with him now, and he has given you his opinion straight out.

Q. Now, you distinguish between those photographs that we have on the news stands, and that I have shown you here, and this film in the fact that there was motion in the film, The Lovers, and there is no motion in these pictures?

[fol. 374] A. That is right.

Q. Is it your contention that in order to be obscene there must be motion in a picture, or some kind of display?

A. No.

I think that you could have a still picture that is very, very dirty, but I think that what was intended here is art, but I don't agree that it was art by any means.

Q. What is it then?

A. It is a magazine.

Q. Is it sex?

A. I don't know, and I wouldn't call that sex, but perhaps it is sex to some people and not to other people, and when you are asking me to define that you are asking me to define obscenity.

Q. Fact is that what is sex to one man is not sex to another man.

A. What may excite one man may not excite another man.

Q. How about as between normal people, would something that would excite you not excite someone else?

Mr. Osborne: Objection.

Mr. Kleinman: He has stated that, your Honor.

[fol. 375] Judge McDermott: Yes.

A. I think that is more or less true because no people are alike, but as a general rule what would excite one per-

son might not excite another, but there are some exceptions.

Q. And how do you arrive at this conclusion?

A. Because I was excited by the Lovers.

Q. You don't know if anyone else in this room would be excited by the Lovers?

Mr. Osborne: If the Court please, wish to object.

A. No.

Judge McDermott: Let that stand.

A. I haven't the vaguest idea what anybody else would think, and I wrote my own opinion in the paper.

Q. Are you familiar with the history of the film, The Lovers, Mr. Marsh?

A. Only as it has been shown around, and it was shown in New York, and what has happened to it in Dayton and here, and that is about all I know.

Q. Do you know—

A. I do know that a great deal is happening in France at the moment on the new wave, with reference to the new wave.

[fol. 376] Q. We are talking about the Lovers.

A. That is the new wave.

Mr. Osborne: Let him answer that.

What was that? I did not catch that?

Judge McDermott: Read the answer back to the prosecutor, Mr. Sato.

(Answer read back.)

Q. Are you familiar with the producer or the director of the film, The Lovers?

A. Of course not.

Q. You don't know them personally?

A. No, but I hope to meet the director and the producer in the next month, if he will speak to me.

Q. Do you know Jeanne Moreau, the star of the film, Mr. Marsh?

A. No.

Q. Do you know her reputation?

A. I think her last picture was in Five Branded Women.

Q. So far as you know, she is a recognized dramatic actress in France?

A. I think that she is, and I think that she has capabilities.

[fol. 377] Q. Do you know the Venice International Film Festival?

A. I know that there is such a thing.

Q. Do you know whether or not the film, The Lovers, was entered into that festival?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: If he knows, he may answer, and either a yes or no is wanted here.

A. Yes, I think that it was in either Cannes or the Venice Festival, but I don't recall which one it was.

Q. Do you know whether or not it won a prize at that film festival?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. Actually, even if it had won a prize—

Mr. Kleinman: If the Court please—

Judge McDermott: Answer yes or no, Mr. Marsh, and stop there.

A. I would guess that it did, but I can't tell you definitely, [fol. 378] because I don't want to put myself on record, but I think that it did win a prize.

By Judge McMahon:

Q. You don't recall?

A. Not definitely, and not accurately enough to say, but I think that it did win a prize.

By Mr. Kleinman:

Q. You were asked if you know Nico Jacobellis?

A. Yes.

Q. And you stated that you do?

A. Yes.

Q. Will you tell the Court what you know of the character and reputation of Nico Jacobellis?

Mr. Osborne: Objection on two grounds.

Judge McDermott: Yes.

Mr. Osborne: Character is one thing, and reputation is another, and they are being asked in one question.

Judge McDermott: He might be in a position to know one or the other.

Q. You stated that you knew Nico Jacobellis for five years before he became manager of the Heights Art Theater?

A. Yes.

[fol. 379] Q. And have you had contact with him fairly constant during that period of time?

A. He came in and talked about pictures long before he was with Heights Art Theater, and being manager of the theater he comes in every week, and I have known him over that time, and we have talked and have been very friendly.

Q. Do you have the means of knowing Nico Jacobellis' reputation in the community?

A. I do from the people who live in his neighborhood, and whose names it would be unfair to mention, but I do know one that has said that he is a very nice young man.

Q. Do you know his reputation from any other contact?

A. I would rate him a very nice young man.

Q. Very nice young man?

A. Very nice young man.

I have also written, I think, two or three columns since the review of the Lovers as to what I thought about, what had happened to him.

Q. You disapprove, I think?

Mr. Osborne: Objection, if the court please.

Judge McDermott: The objection is sustained.

[fol. 380] Mr. Kleinman: He raised that, if the Court please.

Judge McDermott: The objection is sustained.

Q. Do you know Hollis Alpert of the Saturday Review?

A. I know the name.

Q. Do you know of his standing as a movie critic, Mr. Marsh?

A. No.

I don't think that he is a first string reviewer for the Saturday Review.

Q. Does he review movies in the Saturday Review, Mr. Marsh?

A. Occasionally.

Q. Do you know of the Saturday Review?

A. Yes.

Q. And what is your opinion as to the magazine itself, Mr. Marsh?

Mr. Osborne: Objection, if the Court please.

I withdraw the objection.

Judge McDermott: Will you answer, Mr. Marsh?

[fol. 381] A. Very high.

Q. Did you ever read any other reviews that were written by any other critics with reference to this film?

A. Well, I read the one in Films in Review, and I read the one in the New York Times. I can't quote you anything from it, and I read one in the trade papers, and I can't quote you anything on them either, and Motion Picture Herald, Film Daily, as I remember that, and Variety.

Q. Do you know Bosley Crowther of the New York Times?

A. I have met him three or four times; yes.

Q. How would you rate him among critics of the motion picture film?

A. Very high.

Q. Has he, in fact, been called the dean of motion picture critics?

A. Yes.

Q. Do you know that Mr. Crowther picked this film as one of the ten best foreign films of 1959?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

[fol. 382] A. I know, and I also have been called the dean of motion picture reviewers.

Q. Fine, but you do know that Bosley Crowther picked that as one of the ten best foreign films?

A. Much to my surprise.

Q. But he did pick that?

A. Yes.

Q. And I take it that you disagree with his choice, Mr. Marsh?

A. The answer is unnecessary.

Q. Knowing Bosley Crowther, and knowing of his reputation, in your opinion would he pick a stag movie as one of the best ten movies of '59?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Yes, sustain the objection.

Q. Do you know Philip Hartung?

A. I don't know him.

Q. Have you heard of Philip Hartung?

A. Only briefly, the name, but I don't know anything about him.

Q. Do you know that he writes reviews for the Commonweal?

[fol. 383] A. I don't.

Q. You don't know that?

A. I don't know that, and it rang a bell, but I don't know anything about him.

Q. You don't know if he felt the same way about this film as you do?

A. I don't.

Q. You know of any other critics who feel as you do about the film?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: The objection is sustained.

Q. When you see this film—withdraw the question.

Are you familiar, Mr. Marsh, as to what the word prurient means?

A. Well, I have a vague idea; yes.

Q. Could you tell the Court what the word prurient means in your mind?

A. Well, I think one of the synonyms that comes to my mind is lascivious.

Q. Lascivious?

A. Lasciyious.

Q. Is it synonymous with sexual arousement, Mr. Marsh?

[fol. 384] A. Yes, it can even go on and on to a place where it means an abhorrence toward a certain scene that might be sexual.

Q. But the question I asked is whether or not sexual arousement and prurience are the same in your mind, Mr. Marsh?

A. It is very difficult to play with words because I wear out probably one dictionary every five years, and I still have Hart's Vocabulary left, and probably the only one in town in existence, and word shading is very difficult, and to say yes or no on a certain thing is hardly fair on a word because the English language has too many shadings.

Q. All right.

Now, as critic of motion picture films what is your opinion as to the photography in the film, The Lovers?

A. I thought the photographs was about average. We don't get—we haven't had from France pictures with too good photography.

On the other hand, we have had very good colored pictures from abroad which excel ours, and I don't understand why black and white doesn't come through so well, except, possibly, in the printing.

Q. But you did say that this was average insofar as [fol. 385] photography is concerned?

A. Yes.

Q. How would you compare it with other French films insofar as photography is concerned?

Mr. Osborne: Objection, if the Court please.

I will withdraw that objection.

A. Since I have already said average—

Q. I thought that perhaps you were comparing it with American films.

A. Not all American films.

Q. Average photography of French films?

A. That is right.

Q. What about the musical background to the film, The

Lovers, what is your opinion about that as a critic of motion picture films?

A. I would be very glad to answer that, but it is a long time ago that I heard it, and what stands out in my mind is one particular scene, and I cannot answer you about the musical background, and it is the same as if you asked me about the musical background of some picture that played at the State six months ago, and if the music doesn't stand out and drowns out the picture, if the music stays where it should, it is a good musical background.

[fol. 386] Q. You have stated that there was some sexual arousal on your part during the course of this film, The Lovers?

A. Yes, and you are not embarrassing me.

Q. But it wasn't from the beginning of the film, Mr. Marsh?

A. Indeed not.

Q. How long after the beginning of the film would you say that the film—that you felt this sexual arousal?

Mr. Osborne: Objection, if the Court please.

(Conference among the three judge panel at this time.)

Judge McDermott: We believe that he has answered that.

Mr. Kleinman: This is cross-examination, your Honor, and I am not sure that he has.

Mr. Osborne: Withdraw the objection.

A. I don't know how—

Judge McDermott: It was during direct examination that you did answer at length, and he has now withdrawn the objection, so give him the answer again.

[fol. 387] A. I don't know how long it was after the opening of the picture, but it was the bedroom scene.

Q. I think that you estimated it was in the last reel?

A. I think so, and I believe it was right after she said goodnight to her child.

Q. And when would be the closing of that scene, Mr. Marsh?

A. After the hand—

Mr. Osborne: May the record show that the witness extended the left hand, if the Court please.

Judge McDermott: Hand episode, the left hand; yes.

A. Left hand, in which she expressed the conclusion of the pleasure that she had felt.

Judge McDermott: He has been through that, but only on direct examination.

Mr. Kleinman: Yes.

Q. You did not find any sexual stimulation in the map in the beginning of the picture; did you, Mr. Marsh?

A. I hope not.

Q. Was that answer, "I hope not"?

[fol. 388] Mr. Terrell: That is right.

Q. The polo scene did not incite your sexual desires any?

A. No.

I am sorry, but horses have nothing to do with it.

Q. In other words, so far as you are concerned, that one scene that you have described is in your opinion at least the only scene of any sexual arousal in the film?

A. That is exactly right.

Wait a minute, and we have had several scenes, and have to make that a sequence.

Q. Sequence from the time that she left the bedroom of her child until her hand dropped to the bed?

A. Yes.

Q. Assume that scene was taken out of the film, being an expert on motion picture films, would there be anything in the film to arouse in you sexual interest?

A. If you will read my review, you will note that I have avoided censorship, and if you take that out you are becoming a censor, and I had no thought whatsoever in becoming a censor in writing that review.

Q. I ask you now if that scene were removed if there [fol. 389] would be any other scene or part of the film which would tend to arouse your sexual interests?

Mr. Osborne: Objection, if the Court please.

A. In me, but I don't know how certain people might act about the bathtub scene.

Q. That is exactly right, but you don't know how anybody else would react?

A. No.

Mr. Osborne: I move that the words "exactly right" be stricken from the record.

Judge McDermott: Let that stand in the record.

Q. The motion picture film, The Lovers, deals with an adulterous relationship, does it not?

A. Yes, sir.

Q. You wouldn't consider that theme itself to have any appeal to the prurient interests?

A. No, because practically every day you have pictures of that sort, and they don't have to necessarily arouse us that way, and we have many pictures coming from Hollywood where they made a dramatic problem of adultery, and it is shown so that—and I have no question about that, and beyond that I cannot say anything.

[fol. 390] Q. The question of adultery is one of public discussion?

A. Yes.

Q. And public exhibition by motion pictures?

A. Yes, it is.

Mr. Osborne: Just a minute.

The Witness: I don't think that. He did not ask me, but—

Mr. Kleinman: Judges are having a conference.

(Conference among the three judge panel held at this time.)

Judge McDermott: How long will you be? Go ahead.

Q. The matter of adultery is a problem in society, and we recognize it as such?

Mr. Osborne: Mr. Marsh wasn't finished with his answer before this.

Judge McDermott: Will you go back to that point and read that last series of questions and answers, and get to that point where Mr. Marsh wasn't finished.

The Witness: I think what happened was that I said "but," but it had no point in the answer, although if he had [fol. 391] wanted me to do so I would have gone into greater length and detail, where he would have ordered a yes or no answer, and he would have objected to that.

Judge McDermott: Your answer is complete?

The Witness: Yes.

Q: Did you recognize any conflict in this film?

A. Yes, because there was some minor conflict in it, but it isn't necessarily dramatic conflict.

When she gets put out by the archeologist because he is so long in the house there is conflict but not dramatic conflict.

Q. What about the conflict within the woman herself? Did you recognize that?

A. I wouldn't recognize that as dramatic conflict, particularly the way that the film concluded.

That is a very difficult thing, to make a complete dramatic conflict, and you have to have a conflict that runs throughout the story, and I am not certain that that kind of conflict did, except that we have an unhappy woman, and we have unhappy women in many households, and we have a drama, but it isn't interesting to anybody.

[fol. 392] Q. The film wasn't interesting itself, I take it?

A. That is right up to that point, and things became shocking.

Q. And again that is your own opinion about the interest?

A. Yes.

Mr. Osborne: That is what you are asking.

Mr. Kleinman: Yes, that is right.

I just wanted to make that clear.

Q. Did you have occasion to discuss this motion picture film with other critics?

A. No, because I left the screening room after I saw that and discussed that with no one, and went back to my office.

Q. Did you talk with anyone else about this film, The Lovers? I mean, besides the prosecutors?

A. Since the review was written?

Q. Yes.

A. I am a member of the Y.M.C.A., and it has been talked about around there by many people.

Q. You did not speak with anyone about the film from the time that you saw it until you wrote your review; is that correct?

[fol. 393] A. That is right.

Q. Did you see Room at the Top?

A. I did.

Q. What was your opinion about that?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection.

Q. Did Room at the Top deal with the subject of adultery?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Did that show here?

Mr. Kleinman: Yes; shown at the Heights Art Theater.

Judge McDermott: Overrule the objection.

A. Seems to me that it was fornication rather than adultery.

Q. Dealt with sex?

A. I think that it would have to be sex if there is fornication.

Q. No question in your mind that it was fornication in that film, Room at the Top?

[fol. 394] A. It was like Dreiser's American Tragedy, except that the woman killed herself.

Q. Did you see Some Like It Hot?

A. Yes.

Q. That played in Cleveland; did it not?

A. Yes, sir.

Q. Were there any scenes in Some Like It Hot that were sexually arousing?

Mr. Osborne: Objection, if the Court please.

A. No; I thought that it was very amusing.

Q. Can you name any other picture that you have seen within the last two years that aroused you sexually?

A. I would refer back to my reviews because I said that I never seen anything like that.

Q. That is not responsive!

I asked you if you had ever seen any other picture that had aroused you sexually?

A. No.

I have seen other pictures on which I have written adverse comment, but none that aroused me.

(Conference of the three judge panel held at this time.)

(Another conference held between Mr. Terrell and Mr. Kleinman, and off the record.)

[fol. 395] Q. Do you know John McCarton of the New Yorker magazine?

A. I don't know him, but I read his review.

Q. Have you read Lady Chatterley's Lover?

A. Only part of the book, the abridged version.

Q. You have not read the unabridged version?

A. No, but I saw the picture.

Q. That picture also dealt with the adultery theme?

A. Yes.

Q. Did it deal with sex?

A. Yes.

Q. Dealt with fornication?

A. Well, it was adultery; yes. Beyond that—shall we draw a line where?

Q. It is a fact, Mr. Marsh, that a great many films in the past several years have dealt with the theme of adultery?

A. I think all the time, for years and years—such question has come up in pictures.

Q. Shown to the public?

A. I remember years ago Lewis Stone in a movie called Dangerous Age, in the silent years.

Q. Dealt with the subject of adultery?

A. Yes.

Q. And today there are numerous films shown every day [fol. 396] dealing with adultery?

A. Yes.

Q. And there are films that deal with the subject of homosexuals?

Mr. Osborne: Objection, if the Court please.

I will withdraw that.

Judge McDermott: Overrule the objection, and we have that in this testimony.

The Witness: You will have to explain to me how homosexuals get into The Lovers.

Mr. Kleinman: It doesn't.

Q. The question is, whether or not films today deal with this subject?

A. I think there have been some suggestions of that, and I think that there is a film version of Captive coming out which is an old stage play, but, offhand—

Q. May I remind you about Suddenly Last Summer?

A. Yes.

Q. Deals with the problem of homosexuals?

A. Yes, you're right, but it was handled in such a way that who knows what happened?

Q. But it was shown to the public?

A. Yes, that is right.

[fol. 397] Q. But it is one of the subjects that the public is interested in or at least it is exhibited in motion picture films to the public?

A. I would say because the public is interested in the terrific acting of Taylor and Hepburn, rather than the subject matter.

Q. Would this be a correct statement, Mr. Marsh, from your testimony:

Would you say that the dominant theme in the film, The Lovers, was adultery?

Mr. Osborne: I will object, if the Court please.

Judge McDermott: Overruled, and he may answer.

A. Certainly, it was dominant.

Mr. Kleinman: That is all.

Judge McDermott: Now, gentlemen.

Mr. Osborne: Two questions.

Judge McDermott: All right. Go ahead.

[fol. 398] Redirect examination of Ward Marsh.

By Mr. Osborne:

Q: You said something about "new wave" in answer to a question by Mr. Kleinman on cross-examination?

A. Yes.

It is a group of younger people in France who are making pictures that are quite exciting, and some of them have been very good.

They have been told by the government to tone down what they have been making, and some of them—this was part of the new wave, but may I say that Nico has a picture out to his theater today called 400 Blows which I think is a terrific picture, that is part of the new wave, and they refer back to when France was making those excellent pictures in the 1930's, and that is a terrific picture.

Q. Louis Malle, producer of this film, The Lovers, he belongs to the new wave?

A. Yes, that is right.

Q. And it was since his production that the French Government has told the new wave to tone down; is that right?

A. Yes, but there have been some other pictures made [fol. 399] that have not been shown in Cleveland that has prompted the French Government to tell these younger producers to tone their pictures down, and one picture being shown in Paris only, and it will not be exported to America at all.

Q. In the cross-examination you were asked about the Venice Film Festival.

A. Yes.

Q. Could you tell us what the Venice Film Festival is?

A. Well, it hasn't too hot a reputation in some respects because for a good deal of the time many Communist pictures won awards. That is not so true today as it was then, and a good many pictures today have a very good chance, but we have not entered very many pictures in any of the foreign festivals, either in Venice or at the Cannes Festival.

Mr. Osborne: I have no further questions.
Judge McDermott: Anything further, gentlemen?
Mr. Kleinman: Yes.

[fol. 400] Recross examination of Mr. Ward Marsh.

By Mr. Kleinman:

Q. Do you know now, or did you at that time know when you wrote your column, that this film was playing in other cities in the country?

A. I knew that it was in New York City.

Q. Did you know that it was playing in Columbus, Ohio?

A. I did not.

Q. Did you know that it played in 30 cities at least throughout the United States?

A. I heard that, but I did not know.

Q. And did you know that this film had been passed by the Bureau of Customs?

A. That is the only way that it could get in.

Q. And you did know that it was passed by the Bureau of Customs?

A. Yes.

Q. And you think that the people of the County of Cuyahoga are not prepared to see this film?

Mr. Osborne: Objection, if the Court please.
Judge McDermott: Just a moment, gentlemen.

[fol. 401] (Conference of the three judge panel held at this time.)

Judge McDermott: Sustained as to the form of the question.

Read the question, and the form did not appeal to me.

(Question read back.)

Mr. Osborne: I will withdraw the objection.
Judge McDermott: Go ahead, but the form appeared to be out of order to me, and the Court could be wrong.
Judge McMahon: Do you have that question in mind?
The Witness: I don't have the question.
Judge McMahon: Would you read that, Mr. Reporter?

(Question read back at this time to the witness.)

Judge McDermott: Read that again, but don't answer it, Mr. Marsh, and I still don't agree as to form, but the Court could be wrong.

(Question read back again.)

[fol. 402] (Conference held of the three judge panel at this time.)

Judge McDermott: The majority of the Court think that he is in position to answer that, and they overruled me.

Q. Will you answer that, please?

A. I can't answer that question yes or no, because I immediately cause a censorship, and I am not running a censorship column.

Judge McDermott: That is your answer.

Anything else?

Q. Did you have any lustful thoughts from having seen the Lovers?

A. When I said that it excited me, I did.

Q. You had lustful thoughts?

A. Yes.

Q. What do you understand about lustful thoughts, Mr. Marsh?

Mr. Osborne: I will object, if the Court please.

He has answered that question, if the Court please.

Judge McDermott: Yes. Lustful speaks for itself, and [fol. 403] he said that it was that; and we will take notice of that.

Mr. Kleinman: I will withdraw that.

Judge McDermott: After all, he was brought here on subpoena, and he has some rights, too.

The Witness: I don't know if I could say this or not, but—

Judge McDermott: Wait until you get a question, and we don't want to get error in this case, and be very careful.

Mr. Kleinman: No further questions of this witness.

Mr. Osborne: No further questions of Mr. Marsh.

Judge McDermott: Thank you, Mr. Marsh, and you are through.

(At this time recess was taken for the luncheon hour.)

[fol. 404] Reporter's Certificate to foregoing transcript (omitted in printing).

* * * * * * * *

[fol. 406]

Thursday afternoon, May 26, 1960, at 1:30 P. M.

Judge McDermott: Call your next witness, gentlemen.
Mr. Osborne: Mr. Andorn, please, call him.

Thereupon, the State, in order to further maintain the issues on its part to be maintained, called as a witness SIDNEY ANDORN, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Sidney Andorn.

By Mr. Osborne:

Q. May we have your name, sir?
A. Sidney Andorn.
Q. A-n-d-o-r-n?
A. Right.
Q. Where do you reside?
A. Bentleyville Road, Moreland Hills.
[fol. 407] Q. What is your business or occupation?
A. I am with W. G. A. R. radio.
Q. What are your duties with W. G. A. R. radio?
A. Editorial writer and broadcaster.
Q. How often do you broadcast?
A. Once a day, evening.
Q. And writing, what does it consist of?
A. Covering the contemporary affairs in the community, and oftentimes in the nation, and sometimes in the world.
Q. W. G. A. R. is a Cleveland broadcasting radio station; is that correct?
A. Yes.

Q. And can you tell us how far it would be?

A. 50,000 watt station, and covers quite a territory, and I don't know exactly, but it goes beyond this one state.

Q. I see.

How long have you been with W. G. A. R.?

A. Not so long, and a few weeks this time, but I was with them before and then I left them for the Cleveland News which folded up, and I then went back to my present position with W. G. A. R.

Q. But your current stay with W. G. A. R. is how long, sir?

[fol. 408] A. Matter of eight weeks.

Q. And in connection with your work, duties, with W. G. A. R., are you in contact with many persons throughout this community?

A. Yes.

Q. In what respect are you in contact?

A. Well, in order to check out information for the editorials I write, and late broadcast, I have to talk to many people, and get information, and I sound out a great many people for their feelings on the subject that I want to speak about, so that I feel I have the pulse of the community before I talk.

Q. You mentioned the Cleveland News?

A. Yes.

Q. That was one of the two afternoon papers in Cleveland?

A. Right.

Q. Was that an afternoon paper until January, 1960, Mr. Andorn?

A. January 23rd.

Q. What did you do for the Cleveland News?

A. Wrote a general column, editorial commentary, which is exactly what I am writing now for radio.

Q. How long were you with the Cleveland News, Mr. Andorn?

[fol. 409] A. Five and one-half years.

Q. Was that a newspaper of general circulation, Mr. Andorn?

A. Yes.

Q. Throughout Cuyahoga County?

A. Yes.

Q. In connection with your duties with the Cleveland News, did you have contact with persons throughout this community?

A. Yes, I did. I did exactly the same kind of checking out I am doing now, plus the fact that I went out and made a lot of speeches for the various P.T.A. groups, and sometimes I made as many as three per week on those.

Q. Could you give me on the average how many speeches you gave a week to different groups?

A. About three a week.

Q. And would you specify the type of groups you spoke to?

A. Type of what?

Q. Groups?

A. P.T.A. groups, and men's clubs, and groups, and various church groups, and the Kiwanis Club, and the Rotary, and the Boy Scouts, and every type of group that you could find to speak to in a community of this type.

[fol. 410] Q. And is that throughout Cuyahoga County?

A. Yes, throughout.

Q. And in connection with your speeches to these groups, did you have contact with the audience outside of addressing them?

A. Before and after the speech, and, as a general rule, after the speech was made. They don't pay anything for these speeches, and they do have a refreshment hour after it is over where they serve coffee and you sit down and enjoy yourself and talk with the whole group at that time and meet them individually.

Q. Before you were with the Cleveland News, what was your business or occupation?

A. I was with W.X.E.L., which is now W.J.W., Television Channel 8.

Q. Cleveland station?

A. Cleveland station.

Q. How long with that station?

A. From the time that they opened in '49 until the time that I went with the Cleveland News, which was '44.

Q. What were your duties with W.X.E.L. T.V. station?

A. Program director, and also I was the special events [fol. 411] director.

Q. Briefly, could you tell us what your duties were as program director and special events director, Mr. Andorn?

A. As program director it was my job to ascertain what programs should go on the air, and what programs should not go on the air, and it was my job to dream up programs that should go on the air.

Q. In connection with your duties, was there a question of selection on your part with reference to programs?

A. Yes, definitely a selection.

Q. In connection with that position with Channel 8, T. V., were you in contact with many persons throughout the community?

A. Yes.

Q. In what respect?

A. Since '49 when television was an infant, and everybody wanted to and had a tremendous interest in this new medium.

Also, everybody wanted to get on the television and get on the air, and they were in and out of the studios, and, in addition, in the early days of television we did a great deal more experimental work about taking cameras out to the people, and we were out very much of the time [fol. 412] doing remote telecasts.

Q. What was your position or occupation prior to joining W.X.E.L.?

A. I was with W.G.A.R.

Mr. Kleinman: I would like to inquire as to his expertness in the field.

(Conference of the three judge panel held at this time.)

Judge McDermott: Court feels that he has been qualified.

Mr. Kleinman: I would like to cross-examine him right now.

Judge McDermott: Right now?

Mr. Kleinman: Yes as far as his being an expert.

Judge McDermott: The court agreed he has been qualified, but if you want to cross-examine him I will ask you to sit down and do that later.

Mr. Kleinman: I feel constrained to.

Judge McDermott: You will have a full chance later.

Mr. Osborne: In view of the objection that has been [fol. 413] raised, I feel that I should go further, Judge.

Q. What was your business or occupation—withdraw that.

Before you were with T. V. Station W.X.E.L., you state that you were with W.G.A.R.?

A. Yes.

Q. For how long?

A. 12 years.

Q. And your position?

A. Special events director.

Q. How long have you resided in or worked in Cuyahoga County?

A. About 45 years.

Q. Mr. Andorn, based upon your work and your residence, and your contacts within this county for that period of time, are you acquainted with the standards of this community as far as matters dealing with sex are concerned?

Mr. Terrell: Objection.

Judge McDermott: Overruled.

Mr. Terrell: Exception.

Judge McDermott: Yes, you may have your exception.

Mr. Terrell: Thank you.

Q. What is your answer?

[fol. 414] A. May I have the question again?

Judge McDermott: Mr. Sato, would you please read the question again?

(Question read.)

A. Yes, I would say I am.

Q. Have you had occasion to see a movie entitled, Les Amants—

Mr. Kleinman: Objection.

Q. —The Lovers?

Mr. Kleinman: Objection, if the Court please, and there isn't any particular question, but if he proposes to use Mr.

Anderson as an expert I would like to have an opportunity to cross-examine as to his expertness in the field.

Judge McDermott: He hasn't testified yet to anything prejudicial, gentlemen. Just a moment.

(Conference held at this time of the three judge panel.)

Judge McDermott: Let us hear the last question again, Mr. Sato.

(Question read back.)

By Judge McDermott:

Q. Yes, or no?

[fol. 415] A. Yes.

By Mr. Osborne:

Q. Now, are you acquainted, sir, with the limits of candor of this community at the present time with reference to the public discussion with reference to matters of sex?

Mr. Terrell: Objection, if the Court please.

Judge McDermott: Overruled now, thus far.

Q. You may answer. Go ahead.

A. I did not get the question.

Q. Well, I will withdraw the question, and perhaps it was awkwardly put.

Are you acquainted with the accepted standards within this community at the present time as far as public discussion or public portrayal of matters of sex are concerned?

A. Yes.

Mr. Terrell: If the Court please, I object and move the answer be stricken. That is for the Court to determine about the accepted standards.

Judge McDermott: The Court will overrule your objec-

[fol. 416] tion until the next question, and you can cut right in and cross-examine.

By Mr. Osborne:

Q. Sir, I want you to have in mind the contemporary standards of this community—I'll withdraw that question.

First of all, sir, can you tell us what is the dominant theme of the movie entitled Les Amants, or "The Lovers"?

Mr. Terrell: Objection.

Mr. Kleinman: Objection.

Judge McDermott: Overrule the objection.

Mr. Terrell: Now is when we wish to test his qualifications.

Judge McDermott: I will give you a chance, and I don't think the time is right yet.

Mr. Terrell: They asked about the dominant theme of this picture, your Honor.

(Court at this time had a conference among all three judges.)

Judge McDermott: Court feels thus far that he is qualified.

Mr. Terrell: All right.

[fol. 417] Judge McDermott: Mr. Anderson, do you have the question?

The Witness: May I have that read again?

Judge McDermott: Will you read the question, Mr. Sato?

(Question read.)

A. That dominant theme is sexual incitation, or pruriency.

Mr. Terrell: Move that the answer be stricken.

Mr. Osborne: We will ask that the last two words "or pruriency" be stricken.

Judge McDermott: That will be stricken from the record and disregarded.

Mr. Kleinman: Ask that the balance of the answer be stricken as a conclusion of the witness.

Judge McDermott: We did strike that just now.

Mr. Kleinman: I am talking about the first part of his answer, Judge. That has not as yet been stricken.

(Conference held at this time among the three judge panel.)

[fol. 418] Judge McDermott: The first part of the answer will stand.

Q. I want you to have in mind the present day community standards with reference to the public discussion or public portrayal of matters of sex, and I ask you further to have in your mind the average person, and my question is this:

Does the motion picture, Les Amants, or "The Lovers," in view of the contemporary community standards and to the average person—does it tend to arouse lustful thoughts and desires?

A. Yes.

Mr. Kleinman: Objection, and ask that the answer be stricken.

Judge McDermott: Overruled.

Mr. Kleinman: At this point I think that he is asking him an opinion as an expert.

Judge McDermott: We have noted that the prosecutor's questions are very carefully worded, and we will let you examine at the proper time, and we do not believe that now is the time.

Mr. Kleinman: We object to the form of the question [fol. 419] and not include the dominant theme.

Mr. Terrell: The question had the words average person, and we have no definition of the average person by this individual, and you have taken a conclusion.

Judge McDermott: You may cross-examine.

Mr. Terrell: Now?

Judge McDermott: Later.

Mr. Terrell: We want an exception.

Judge McDermott: You may have that.

Q. You have expressed the opinion that this movie to the average person in view of the contemporary community standards tends to arouse lustful thoughts and desires?

Mr. Terrell: Objection to the repetition of the answer by the prosecutor, your Honor.

Mr. Osborne: This is prefatory, your Honor.

Judge McDermott: Just a moment, gentlemen.

[fol. 420] (Conference held at this time of the three judge panel.)

Judge McDermott: Overrule the objection.
He has repeated what he said from the witness stand.
Let him finish the question.

Q. Now, sir, will you tell us the part of it that you predicated that upon on which you have just expressed?

Mr. Kleinman: Objection.
Judge McDermott: Overrule the objection.

A: Well, from my experience in newspapers, and you did not ask this, but I had six years experience with the Press before I went with radio.

I don't think that any newspaper in this area has a right to print according to contemporary community standards a still picture of a man and woman naked together in a bathtub, and this is in the picture, and as far as television is concerned I can safely say that no television station in this area would dare show this movie.

Q. Now, you have mentioned the bathtub scene. Are there any other scenes which give rise to your conclusion concerning the effect upon the average person, Mr. An- [fol. 421] dorn?

Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: Objection is overruled.

A. One scene which gives a high inference of an abnormal sex act.

Q. Where does that scene take place?
A. In a bed.

Mr. Kleinman: Objection, if the court please.
Judge McDermott: Overrule the objection.

A. In a bed.
Q. In whose bedroom was that?

Mr. Kleinman: Objection.
Judge McDermott: Objection is overruled.
Mr. Kleinman: May I at this time interpose a continu-

ing objection to his testimony, so that I will not interrupt [fol. 422] his testimony?

Judge McDermott: Yes, the record may show your continuing objection.

Q. Whose bedroom?

A. I imagine her bedroom, and the picture wasn't very clear to me at that point because all of a sudden he shows up with a robe which obviously fit him after they go through the convolutions, but I never did find out where he got the bathrobe from.

Q. You mentioned convolutions. Will you tell us what those were?

Mr. Terrell: Same objection for the record.

Judge McDermott: Yes.

A. Which?

Q. Pardon?

A. Which particular series of convolutions?

Q. You mentioned about his reappearing with a bathrobe. Immediately prior to that what were the convolutions that you—upon which you have predicated your statement?

A. There was a series of wild and uncontrollable sexual passion, visibly displayed in a bed, and another series was in a bathtub.

Q. All right.

[fol. 423] And directing our attention, sir, to the activities in the bed, will you tell us specifically what it was there that would have those effects as you testified?

A. I don't feel that I would like to describe that scene in public.

Q. In general, can you state what it was, without the specifics?

A. The inference was very strong that an unnatural sex act was being performed, and she as a result of that reached a climax.

Q. All right.

And were there any other instances within that film that occurred to you as forming a foundation for your opinion about the effect of the film on the average person?

A. No.

I think the bedroom scene and the bathroom scene certainly should be enough.

Q. All right.

Now, sir, you testified concerning your acquaintanceship with the community standards in this field.

I ask you whether or not the scenes that you have described—I will withdraw that question.

I want you to address yourself, sir, to the film as a whole, [fol. 424] including the things that you have testified to within the film.

I will ask you whether or not, sir, the film as a whole contravenes the contemporary community standards with reference to the public discussion and public portrayal of the matter of sex?

A. Yes.

Mr. Kleinman: Objection, if the Court please.

Judge McMahon: You have a continuing objection to this entire line of questioning, Mr. Kleinman.

Mr. Terrell: Are you overruling the entire line?

Judge McDermott: Yes, we are overruling the entire line.

Q. And do you have an opinion as to whether the film as a whole, including the specific matters that you have testified to, whether the film to the average person in consideration of the present day community standards arouses lustful thoughts and desires, Mr. Andorn?

A. Yes.

Q. What is that opinion, sir? Does it arouse lustful— [fol. 425] A. Yes, it does arouse lustful desires, and I think the film is aphrodisiac.

Mr. Terrell: Strike out the latter part.

Mr. Kleinman: I don't know what it means.

Judge McDermott: That is beyond what the answer called for.

Mr. Osborne: You may inquire.

[fol. 426] Cross examination of Sidney Andorn.

By Mr. Kleinman:

Q. You stated that you have spoken many times during the course of your experience to various groups, is that correct?

A. Yes.

Q. What sexual matters did you discuss with these groups?

A. Well, one particular panel was where I was the moderator, and one of the speakers of the panel was Judge Mary Grossman and Dr. Ewing Crawfis of the Fairhill Receiving Hospital.

I also went around from P.T.A. to P.T.A. for a solid year discussing sex and the P.T.A.'s are terribly interested in the subject, and were trying to find ways and means to do something about that. This was sex molesters.

Q. Will you describe some other lectures on sex where you participated?

A. Let us get this straight, and I am not a sex lecturer.

Q. I am merely trying to find out whether or not you did any talking to these people from the platform about sexual matters.

[fol. 427] A. On sex molesters cases.

Q. Any other kind of cases?

A. No.

Q. Ever discussed with those people the particular effect upon them of any particular matter?

A. Yes.

Q. And who are these people that you spoke to, Mr. Andorn?

A. Various P.T.A. groups, men's groups, church groups, temple groups, Kiwanis, Rotary Service, and the general run of groups wanting to hear a speaker in this community, and they are legion.

Q. Let us get away from your speaking from the platform.

You have indicated that after a speech you have had a session of questions and answers and discussion afterward?

A. Yes.

Q. Did you at that time discuss with people whether anything aroused their sexual interest?

A. Yes, we discussed that.

Q. Did you?

A. Yes.

Q. Can you name someone with whom you discussed that?

[fol. 428] Mr. Osborne: I will object, your Honor.

Judge McDermott: You object, Mr. Prosecutor?

Mr. Osborne: I will withdraw the objection.

Judge McDermott: If you can recall a public meeting.

A. You mean individual names?

Q. Yes.

A. No.

Q. When was this?

A. This year, and '59, and '58, and particularly in 1958.

Q. I am referring particularly to whether you asked a particular individual or group of individuals as to what stimulated them sexually?

A. I have never asked them that particular question because I think that would be rude.

Q. You never asked that question?

A. No, because I think that would be rude to ask such a question.

Mr. Kleinman: That should be stricken.

Judge McDermott: The Court will strike that last, and [fol. 429] we will sustain that.

Q. Did you ever observe the reaction upon any individual of a stimulus of a sexual nature?

A. Yes.

Q. Upon whom?

Mr. Osborne: Objection.

By Judge McDermott:

Q. Can you give him the names?

A. I can't give him the names, but I can give him when and how that happened.

In the course of my column writing in the News I was informed that Jean's Fun House was running movies which were found to be obscene by a jury in this court here.

Mr. Kleinman: Objection to that.

Judge McDermott: Strike that from the record.

The Witness: I am sorry, but I just wanted to—

Judge McDermott: Leave that out.

The Witness: I wanted to point out the kind of thing that I went to see, and you put a quarter in the machine, and the film shows women scantily clad, and obvious effort [fol. 430] to incite lust.

You put these quarters in the machine, and you look.

I stood at this place for a solid afternoon observing the men that came in to drop quarters in these machines to see lustful incitations that these machines would have on them; and I did not ask them for their names.

By Mr. Kleinman:

Q. What effect did you observe?

A. I observed an effect which to me was most alarming. It was very disconcerting to me.

Q. Did you observe indecent exposure?

A. No.

Q. Any rape?

A. No.

Q. So-called mashing?

A. What?

Q. Mashing?

A. I don't know what that is.

Mr. Kleinman: Withdraw the question.

Mr. Kleinman: I am not sure what that is either.

[fol. 431] Q. This is very disconcerting to watch?

A. Yes.

Q. What did you see exactly? They were looking in the machine and putting in quarters?

A. Yes.

Q. Did they leave?

A. Eventually.

Q. Do you know where they went?
A. No.
Q. You don't know what they did?
A. No.
Q. Now, aside from that particular time when you were in Jean's Fun House watching these people watching movies, have you ever had any other occasion to see stimulus or reaction upon any individual from a sexual stimuli?
A. No.
Q. Never did?
A. No, sir.
Q. I believe that you have testified you never asked anybody what stimulates them; did you?
A. That is right. I did not.

Mr. Klein: If the Court please, at this time I would like to ask that the testimony of this witness be stricken on [fol. 432] the ground that his ability to testify upon the stimulus of the average man in the community based upon contemporary community standards has not been shown, and that is his opinion, his own personal opinion, and has no consequence in this matter.

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time between the three judge panel.)

Judge McDermott: Court feels that Mr. Andorn has qualified himself to testify about moral standards and sex standards of this particular community, and your request will be overruled, in view of the nature of the questions that the prosecutor has asked, and they are carefully worded.

Mr. Kleinman: Exception.

Judge McDermott: Yes, you may have an exception.

Mr. Kleinman: I should like to proceed with the cross-examination without waiving the exception that we made in the record, your Honors.

Judge McMahon: Did you complete your direct examination, Mr. Osborne?

[fol. 433] Judge McDermott: He turned the witness over to the defendant.

Mr. Osborne: I have completed the direct, and I may have some redirect later on.

Mr. Kleinman: Point is that I believe that it has been established from the cross-examination that this man who testified as an expert has not been qualified as an expert, and I gather from his testimony that he has not shown that he has any special knowledge as to sexual reaction of any individual in the community.

Judge McDermott: The Court has made its ruling.

By Mr. Kleinman:

Q. Now, Mr. Andorn, you said that no television station in the city of Cleveland would dare show this film?

A. Yes.

Q. And is that upon what you base your judgment, that it does not meet contemporary community standards?

A. Yes.

Q. Did you read Lady Chatterley's Lover?

A. Yes.

[fol. 434] Q. Would any radio or television station dare read that book?

Judge McDermott: No one would dare read that, to violate the law deliberately.

Mr. Osborne: Decided in the Federal District Court in New York, and we present that that is not in issue, the comparison of the movie with the book, and that is a book and is something else again.

Judge McDermott: We feel that way also.

Mr. Kleinman: To save the time of the Court and to inform myself, whether it is the view of this Court that the test of obscenity as relates to books and magazines is different from the test of obscenity as it applies to motion pictures.

Mr. Osborne: I object to the Court being questioned, and the Court sits as a jury in this case.

Mr. Kleinman: I ask for assistance on a legal question.

Judge McDermott: We have given our reasons yesterday, and they are in the record.

[fol. 435] Judge McDermott: What was your last question, Mr. Kleinman?

Mr. Kleinman: Will the reporter read that, and I don't recall.

(Question read back at this time to all concerned.)

Q. Would any television station read that book over the air?

Judge McDermott: Would you mind putting that question to him again as he has indicated he did not hear you.

Mr. Kleinman: Will you read the question, Mr. Reporter?

(Question read.)

Q. Do you understand the question?
A. Yes.
Q. What is your answer?
A. No.
Q. Do you know where the Roxy Theater is?
A. Yes.
Q. Would you describe what kind of theater that is?
A. That is known as a burlesque theater.
Q. Have you ever attended that theater?
A. Yes.

[fol. 436] Mr. Osborne: Objection, if the Court please.

Judge McDermott: Objection is overruled.

Q. Have you seen performances in that theater, Mr. Andorn?
A. Yes.
Q. Will you describe the performances generally, Mr. Andorn?

Mr. Osborne: Objection.

Judge McDermott: Objection is overruled.

A. The performances at the Roxy Theater are essentially strip tease girls who disrobe entirely in order to arouse the sexual passion of the men in the audience.

Q. Ever observe the comedians, so-called, in these burlesque theaters?
A. Yes.
Q. Will you describe in general the nature of the comedy?

Mr. Osborne: Objection, if the Court please.

(Conference held of the three judge panel at this time.)

[fol. 437] Judge McDermott: Objection is overruled.

A. Very low standard, and the jokes that they tell are double meaning jokes, the type that you would normally hear at stag parties.

Q. Very vulgar?

A. I am not qualified about whether they are very vulgar, but they are double meaning.

Q. Would any radio station or television station in the city of Cleveland exhibit such a performance on the television network?

A. As the Roxy Theater puts on?

Q. Yes.

A. No.

Q. Are you familiar with the fact that the Roxy Theater has been operating for a good many years in the city of Cleveland?

A. Yes.

Q. And that it is open and attended by the public at large?

A. Yes.

Q. Are you familiar with Short Vincent Street, Mr. Andorn?

A. Yes.

Q. Are you familiar with the various clubs on Short Vin-

[fol. 438] cent?

A. From the outside.

Q. Never been inside one of them?

A. No.

To be honest, I have been inside one of them, City Club.

Q. Theatrical Grill, how about the Theatrical Grill, Mr. Andorn?

A. I have eaten in the Theatrical Grill.

Q. Nice place?

A. Good food.

Q. Mickey's Club?

A. Never.

Q. 7:30 Club?

A. No.

Q. Know anything about them?

A. No.
Q. Do you know their reputation?
A. Yes.
Q. Do you know what goes on in those clubs, Mr. Andorn?
A. No.
Q. Their reputation good or bad?
A. It isn't good.
Q. They are open to the public?
[fol. 439] A. Yes.

By Judge McMahon:

Q. You are excepting the City Club?
A. Yes, definitely. He named the various clubs that he wanted me to talk about.

Judge McDermott: Anything else, Mr. Kleinman?
Mr. Kleinman: I want to collect my thoughts a moment, and he is a good witness, and he kind of threw me off.
Judge McDermott: Take your time, and you are entitled to that.

By Mr. Kleinman:

Q. Mr. Andorn, you said that no radio station or television station would dare read the unabridged version of Lady Chatterley's Lover over the air?
A. Yes.
Q. Would you tell me why?
A. Because certain sections of it are obscene, and the language of certain sections is obscene.
Q. In your judgment?
A. Not only in my judgment. I think if you were to use that same language in your home your wife would call you obscene.
Q. Do you rest your testimony on that? I will bring [fol. 440] her over.

Mr. Kleinman: I ask that the answer be stricken as not being responsive, your Honor.
Judge McDermott: The latter part about being in the home, but you asked him.

Mr. Kleinman: I am sure that I never spoke to him about marital obligations or marital problems.

Mr. Osborne: You are married.

Mr. Kleinman: Yes, and I have two children.

By Mr. Kleinman:

Q. But to you this language is obscene?

A. Yes.

Q. Are you aware that this book is circulating freely on the news stands in the city of Cleveland, Mr. Andorn?

A. Yes.

Q. And that there are copies of it in the public library?

A. Yes.

Q. Are you aware that this book has been judicially determined not to be obscene?

Mr. Osborne: Objection, if the Court please.

[fol. 441] Judge McDermott: Sustain the objection.

Q. Now, I take it from your answers that—

Mr. Osborne: I wish to state the reasons for my objection.

Judge McMahon: The Court has ruled on that, and the objection is sustained, Mr. Prosecutor.

Judge McDermott: It would not have made a whole lot of difference either way, but the Court did sustain that.

Mr. Osborne: I thought in fairness to the entire record it should be stated that the determination of obscenity is based upon the entire book and not upon isolated passages, and—

Judge McDermott: That has been our ruling.

Mr. Kleinman: Same rule applies to a movie.

Mr. Terrell: Same thing applies to this picture that we have here, your Honor.

Judge McDermott: I said we are looking at the picture [fol. 442] from all four corners.

Mr. Terrell: And Lady Chatterley's Lover from all four corners.

By Mr. Kleinman:

Q. Looking at the picture, "The Lovers," I take it that your opinion is that the movie is obscene?

A. It is in my opinion.

Q. The movie as a whole?

A. Yes.

Q. Take out the love scene. Does that change your opinion of the film?

A. You have nothing then.

Q. Is it obscene?

A. Take out the love scene?

Q. Yes.

A. It isn't obscene without the entire love business; no.

Q. Is there anything obscene about the map in the beginning of the film?

A. If one wishes to look at it in a way it might be called that, but I don't wish to look at it that way.

Q. Some people might call that map obscene, Mr. Andorn?

A. Yes.

[fol. 443] Q. Some people see obscenity in ink blots?

A. That is the Rorschach test, and you would have to have a psychiatrist to talk about that.

Q. But you did not see anything about sexual matters in the map?

A. I did not have to, and I saw enough in the rest of the film.

Mr. Kleinman: I move to strike that.

Judge McDermott: Let his answer stand, and overrule the objection.

Q. Mr. Andorn, in connection with sex, what matters are generally discussed in the community about sex? Do they talk about adultery?

A. Yes.

Q. Do they attend motion picture films that deal with the question of adultery?

A. I would imagine that they would, but I don't know.

Q. Do they talk about homosexuals?

A. They do.

Q. Do they attend films that at least discuss homosexuality?

A. I don't know that because I don't see any films that discuss that.

[fol. 444] Judge McDermott: Wouldn't it be fair to ask him if such films had been shown in the city?

Q. Do you have any knowledge about whether or not any pictures were shown that described adultery?

A. No.

Q. Did you see Room at the Top?

A. No, I didn't.

Q. Do you know any film that dealt with the subject of homosexuality?

A. No.

Q. Did you see Suddenly Last Summer?

A. I did.

Q. This does not deal with homosexuality?

A. I don't think so.

Q. Did you see Crack in the Mirror?

A. No, I didn't.

Q. But in your discussions, have people discussed adultery?

A. Yes.

Q. They discussed problems arising from adultery, did they?

A. Yes.

Q. They discussed adultery?

A. They did.

[fol. 445] Q. Did they discuss homosexuality?

A. Sometimes; yes, they did.

Q. Discuss the problem?

A. Yes.

Q. And the possible solution to the problem?

A. Yes.

Q. These are all discussed freely and in public, are they not?

A. I did not say that they were discussed freely and in public.

Q. Where were they discussed?

A. Closed little groups of people.

Q. Mixed groups?

A. But adult mature groups, and in their own living-rooms, and in the privacy of their own homes.

Q. Have you ever been present when immature people had discussions with regard to it, to sex?

A. What do you mean by immature?

Q. You said mature?

A. Yes.

Q. Are you speaking chronologically, same way that you use mature?

A. I am using mature from the standpoint of emotional and intellectual maturity; and I have never heard immature people do that; no.

[fol. 446] Q. Did you recognize any themes in this film, The Lovers?

A. Musical themes.

Q. Story and dramatic themes?

A. I saw no dramatic theme in the story.

Q. You did not see the question of adultery?

A. No. I did not think that there was a conflict. I did not see a conflict in the movie, and it moved directly to the moment and no hesitation, and went in a direct line without a conflict to me.

Q. Question is whether there was a theme of adultery in this movie?

A. Well, if—I can't condone a woman leaving her husband.

Mr. Kleinman: If the Court please, "I can't condone a woman leaving her husband," that is not responsive to my question.

Judge McDermott: Strike out that part, and the Court will disregard that.

Q. The question is:

Is there a theme of adultery in the film, Mr. Andorn?

A. Theme of adultery is there.

Q. Are there any other themes in the film?

A. Such as what?

[fol. 447] Q. I am asking you if as an expert you observed any other themes in the film.

Did you observe the abandonment of property in the film?

A. Leaving the daughter.

Q. Leaving the car on the side of the road, and throwing clothing around?

A. No.

Q. How about the theme of abandonment of the daughter and the husband?

A. She did abandon them, and is that a theme?

Q. I am asking you if you consider that a theme in this movie?

A. As a subhead under the general head of adultery she would have to leave her husband to go with someone else to be guilty of adultery.

Q. We have those themes, and a main theme and a subhead?

A. Yes.

Q. Isn't the dominant theme of this film adultery, Mr. Andorn?

A. Not to me.

Q. What is the dominant theme, abandonment?

A. No.

Q. What is it?

[fol. 448] A. Dominant theme to me is uncontrolled physical sexual passion, and an obscene display of it.

Q. And when did you make this determination, Mr. Andorn?

A. When I saw the movie.

Q. First hour of the movie?

A. No.

Q. Last 15 minutes of the movie?

A. Whole movie, but I arrived at this conclusion after the last—near the end of it, and I might say before the end, a few minutes before.

Q. Before you got to that part, what reaction did you have, before the so-called sex scene?

A. I was hoping that it was building up to something because up to that time I felt that the time was being wasted.

Q. Pretty boring?

A. Yes, but I felt that there had to be a purpose for all this.

Q. As a columnist, are you familiar with some of the people who write reviews for movies?

A. Yes.

I used to write them myself for the Press.

Q. How about national critics, Bosley Crowther of the New York Times?

[fol. 449] A. Yes, but I don't know him.

Q. He is known as the dean of motion picture critics.

A. I think Ward Marsh is.

Q. Well, he is the dean of Cleveland.

Mr. Osborne: He did not say of the Cleveland critics.

Judge McDermott: Mr. Marsh answered that.

Q. Do you know Bosley Crowther?

A. Yes.

Q. Is he considered an outstanding man in the field of motion picture critics?

A. Yes.

Q. Do you know that he picked this film as one of the best ten films of '59?

A. Yes.

Mr. Osborne: Just a minute, your Honor.

By Judge McDermott:

Q. Do you know that he picked this as one of the best ten films of '59?

A. Yes.

By Mr. Kleinman:

Q. Do you know Hollis Alpert?

A. Yes.

[fol. 450] Q. Do you know that he is an outstanding critic of the motion picture?

A. Yes.

Q. And do you know that he picked this film as one of the seven best of the year?

A. Yes.

Q. Do you know that this film is playing in 30 to 40 cities in the United States?

A. I don't know that.

Q. Do you know that this film passed the Bureau of Customs Department as not being obscene?

A. I don't know that, but it must have or it would not be here.

Q. But it is your opinion that using standards of the community of Cuyahoga County that this film is obscene?

A. Yes.

Q. Do you travel much, Mr. Andorn?

A. No.

Q. Do you read much?

A. Yes.

Q. Are you familiar with community standards of any other community aside from the City of Cleveland, Mr. Andorn?

A. No.

[fol. 451] Q. You are not familiar with any other?

A. No.

Q. Then you can't tell us what difference there would be between the community standards of Columbus, Ohio, and Cleveland?

A. No.

Q. Do you have any opinion about whether there is any difference from your experience—

Mr. Osborne: Objection.

Judge McDermott: Sustain the objection.

There isn't any harm done.

A. I am not qualified to state because I don't know, and I don't know anything about community standards anywhere but in this County of Cuyahoga where I spent most of my life.

Mr. Kleinman: I think that is all, if the Court please.

Judge McDermott: Gentlemen, back to the Prosecutor.

Do you have anything, Mr. Osborne?

Mr. Osborne: Yes, your Honor.

Judge McDermott: Proceed.

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[fol. 457] Thursday afternoon, May 26, 1960, at 3:25 P. M.

Judge McDermott: Your next witness, Mr. Prosecutor.
Mr. Osborne: Dr. Jordan.
Judge McDermott: Proceed.

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called as a witness DR. MILLARD JORDAN, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Millard Jordan.

By Mr. Osborne:

Q. You are Millard L. Jordan?
A. Yes.
Q. Is that M-i-l-l-a-r-d?
A. Correct.
Q. J-o-r-d-a-n?
[fol. 458] A. Correct.
Q. Do you have any title other than Mr.?
A. Professor.
Q. At?
A. Fenn College.
Q. What is your title there?
A. Chairman of the Department of Sociology.
Q. Do you have any titles like doctor?
A. No.
Q. Now, what is Fenn College?
A. Institution of higher learning, offering work in engineering, business administration, arts and sciences, accredited by the North Central Association of Colleges, secondary schools.
Q. And that is located in Cleveland, Ohio?
A. 24th & Euclid Avenue.
Q. How long have you been with Fenn College?
A. Nearly 35 years.
Q. What are your duties and responsibilities with the college?
A. Chairman of the Department of Sociology, and instructor in courses relative to marriage in the family and urban sociology.

Q. And would you tell us, sir, what your formal education is?

[fol. 459] A. Graduate of Ohio State University, and about three years of graduate study at Western Reserve and Columbia.

Q. What degree did you receive from Ohio State University?

A. Bachelor of Science.

Q. I see.

Q. And upon your graduation from Ohio State, did you thereafter attend Western Reserve University and Columbia?

A. That is right.

Q. What were your formal studies at Western Reserve and Columbia?

A. Sociology and education.

Q. Can you tell us, sir, what sociology embraces?

A. Study of the relationship of individuals to groups and the influence of groups upon individuals, and the relationship which exists between group and groups.

Q. Do you see any of your former students in this courtroom?

A. I do.

Q. Who is that?

A. Mr. Kleinman.

Q. Defense attorney?

[fol. 460] A. Yes.

Q. How long have you—withdraw that.

What is your address, sir?

A. 2050 McKinley Avenue, Lakewood

Q. Lakewood, is that a suburb of Cleveland or vice versa?

Judge McMahon: That is a leading question.

A. Suburb of Cleveland.

Q. Is that contiguous to the city of Cleveland, Mr. Jordan?

A. It is.

Q. How long have you lived in the Cleveland area?

A. 35 years.

Q. That is the Cuyahoga County area?

A. Yes.

Q. All right.

Now—withdraw that.

What clubs or societies, or organizations, do you belong to, sir?

A. Greater Cleveland Adult Education Council, and the Motion Picture Council of Greater Cleveland, and the Citizens for Decent Literature of Greater Cleveland, and the Downtown Neighborhood Project Committee, and others, and the Welfare Federation Budget Committee, and the [fol. 461] Council on Youth and Crime.

Q. Is that all that comes to your mind at the present time?

A. No.

Q. All right.

A. Member of the Social Work Department of the Cleveland Church Federation, and member of the committees in in our local church; and it seems to me that there are some others, but I can't think of them right at the present time.

Q. All right.

Do you hold any office with reference to any of these organizations?

A. Yes.

Q. Please name them?

A. Chairman of the Greater Cleveland Motion Picture Council; Chairman of the Citizens for Decent Literature; Chairman of the Council on Youth and Crime.

Q. May I ask, sir, what you do with your spare time? I will withdraw that.

Mr. Kleinman: I was going to ask that, too.

Mr. Osborne: I will withdraw the question.

[fol. 462] Q. Now, in your position with Fenn College, are you in contact with many persons throughout this county?

A. Yes.

Q. And by virtue of your membership in and positions with organizations that you have indicated outside of Fenn College, are you in contact with considerable numbers of persons throughout Cuyahoga County?

A. Yes, I am.

Q. Now, sir, in view of your length of stay in Cuyahoga County, and your connections with Fenn College and activi-

ties, and your contacts with persons, and in view of your membership in and positions with other organizations, are you in a position to know the present day standards in this community with reference to the public discussion or portrayal of matters concerning sex?

A. I am.

Q. Now, have you seen the motion picture entitled Les Amants, or The Lovers?

A. I have.

Q. Can you tell us, sir, what is the dominant theme of that motion picture?

Mr. Kleinman: Objection, if the Court please.

[fol. 463] Judge McMahon: Just a moment, sir.

(Conference held at this time among the three judge panel.)

Judge McDermott: What is the basis for your objection?

Mr. Kleinman: Objection to the form of the question.

Mr. Osborne: I will withdraw the question and ask this:

Q. What is the dominant theme of that motion picture, Mr. Jordan?

Mr. Kleinman: Objection.

Judge McDermott: Overrule the objection.

Q. You may answer.

A. Lust or sex.

Q. Now, sir, I want you to have in mind the present day community standards of this community of Cuyahoga County. I want you to have in mind your testimony that the dominant theme of the movie is lust or sex, and, further, I want you to have in mind the average person.

In view of those things, do you have an opinion as to whether or not the motion picture Les Amants, or The [fol. 464] Lovers, deals with sex in such a manner as to arouse the prurient interests, or lustful thoughts and desires?

A. Yes, I have.

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection, and the answer may stand.

Mr. Kleinman: Exception.

Q. Answer given as what?
A. I have.

Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Overrule the objection.
Mr. Kleinman: Exception.

Q. What is that opinion?

Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Overrule the objection.
Mr. Kleinman: Exception.

Q. You may answer, doctor?
A. Lust.
Q. My question was do you have an opinion, and you answered, yes, that you did have an opinion as to whether [fol. 465] or not it aroused lustful thoughts and desires; and now I ask you what is that opinion, does or does not the movie in view of the contemporary standards of the community and the average person, does it deal with sex in such a manner as to arouse lustful thoughts and desires?
A. It does.

Mr. Kleinman: Objection.
Judge McDermott: Overruled.

Q. What is the answer?
A. It does.
Q. It does?
A. Yes.
Q. Now, sir, will you tell us upon what you predicate your conclusions that the movie has the effect that you testified to?

Mr. Kleinman: Objection, and he has answered the question.
Judge McMahon: You asked the reasons for it?
Mr. Osborne: Yes.
Judge McDermott: Overrule the objection.

Q. Upon what do you predicate that opinion?
A. The polo scene showed this girl with her leaning [fol. 466] very affectionately against the leg of this polo

player, and then later, of course, the boat scene where they are placed side by side, and then after a little lapse of time she appeared on the other side of him; and, of course, the bedroom scene where he was taking off apparently her nightgown or negligee, whatever it happened to be; and she was unbuttoning his shirt.

And then he was kissing the front part of her body in a very affectionate manner; and, then, of course, the scene in the bed where there was every reason to believe that they were engaging in the sex relationship.

Q. Were there any other items, sir, upon which your opinion is predicated, other than those you mentioned, the boat scene and the scene in the bedroom?

A. That is right.

Q. And is there anything else at this time that occurs to your mind?

A. Comments made, running comments that were leading up to and setting the stage for the climax of the picture.

Q. All right.

Sir, did you view the scene in the bathroom?

Mr. Terrell: If the Court please, I did not mind, but he [fol. 467] is leading the witness, and gives every answer before the witness testifies.

Mr. Osborne: I have not done that, and you know it.

Mr. Terrell: You certainly have.

Judge McDermott: Rephrase that, please, and that is a leading question.

Q. The question is, did you view the bathroom?

A. Yes.

Q. State whether or not—withdraw that.

In connection with the opinion that you have expressed, did the bathroom scene have any part in that opinion?

Mr. Terrell: I object to that, and that is leading.

Judge McDermott: Overrule the objection.

Mr. Terrell: Exception.

A. It does.

Q. And what was that?

A. They gave the appearance that the two, the man and the lady involved, were in the bathtub together in the nude.

Q. All right.

[fol. 468] Q. Now, were there any other scenes that occur to your mind that support your opinion?

A. Yes.

Q. State what they were?

A. When they were running through the canebreaks or through the underbrush together, there was at least an inference it seems to me that there was a motive for doing it; and I can't think of any others at the moment.

Q. All right, sir.

Now, do you have an opinion as to whether or not the motion picture Les Amants, "The Lovers," as a whole, considered in its entirety, including, of course, these items that you have mentioned, do you have an opinion as to whether or not that movie, applying the contemporary community standards to the average person, whether it would arouse lustful thoughts?

Mr. Terrell: Objection, and that is still leading.

Mr. Kleinman: The witness.

Mr. Terrell: The witness.

Mr. Kleinman: The ultimate question is for this Court to decide, if the Court please.

Judge Pincura: In your brief you urge that very thing [fol. 469] with respect to expert opinion in the Smith case.

Judge McDermott: In view of the ruling that we agree upon now, we do overrule the objection.

The Witness: Will you state the question again?

Mr. Osborne: Surely.

Q. Looking upon the picture Les Amants, The Lovers, as a whole and having in mind the contemporary community standards of this community, and having in mind the average person, does the movie deal with sex in such a manner as to arouse lustful thoughts and desires?

Mr. Kleinman: Exception.

Mr. Terrell: Exception.

A. It does.

Mr. Osborne: You may inquire.

[fol. 470] Cross-examination of Millard Jordan.

By Mr. Kleinman:

Q. Professor Jordan, will you tell us what the Committee for Decent Literature is?

A. Yes.

We have as our purpose the dissemination of information about literature which is on the news stands, and encouraging the law making and law enforcing authorities to see what they can do, if anything, about it.

Q. To do what?

A. Just with the hope that we might have better literature for the public to read in lieu of some which is now available.

Q. How is your judgment as to which is better and which is worse literature arrived at?

A. We are not censors, and we do not judge ourselves. We leave that up to the public and to the police department and the courts to handle that part of it; and we have nothing to say except to try and create an interest on the part of the public in a field which we feel needs some consideration.

Q. This is the opinion of your particular people who are [fol. 471] involved in this committee for decent literature, is that correct?

A. It is.

Q. And in the course of the activities of this group, what kind of information is it that is disseminated and to whom?

A. To the general public on just trying to make them aware of what is available, and both children and adults are reading, and to raise a question as to whether or not that is what we would like in our system.

Q. Do you name books?

A. We do not.

Q. Do you name magazines?

A. We do not.

Q. Motion picture films?

A. We do not.

Q. You don't have any of your literature here with you?

A. I do not.

Q. In other words, as I gather from your answer the intention of this committee is merely to arouse the community to examine the book shelves and the news stands and motion picture films to see whether they are satisfied with the kind of media that are now open to view—public [fol. 472] view?

A. That is true; and, after they have done that, that is really in their own hands, and we have nothing more to say, and it is up to the public we feel to decide what they desire.

Q. Up to the public to decide what they desire?

A. Of course, and as expressed through the law enforcement and law making agencies which we have.

Q. Are you stating then that the law making agencies should determine what the public should read and see?

A. I would prefer to say that the public should encourage the making and enforcing of the kinds of laws which they feel will serve the best interests of all concerned.

Q. Do you have any knowledge as to whether or not the public at large is satisfied with the kind of laws that now exist and with enforcement of the law as it now exists?

A. In some cases there have been decisions made. I am not certain that I can answer as to what the general public thinks, but I do know that 250 cities across the United States are interested in the question at the present time, and 17 of these 250 cities are in Ohio.

Q. When you say that they are interested that is a kind [fol. 473] of a general term.

How are they interested?

A. In the same way just mentioned, in bringing to the attention of the people in their respective communities an understanding of what we have in the way of literature and whether or not that is what they desire.

Q. And the committee itself has not arrived at a decision whether it is satisfied with the type of literature that is on the stands?

A. There is a bit of dissatisfaction at certain points, and we have a large number of very fine magazines and reading material which is commendable, and we are quite pleased with much of it.

Q. Are you familiar with Playboy magazine?

A. Yes.

Q. Familiar with Rogue magazine?

A. Yes.

Q. With Gent magazine?

A. Yes.

Q. You have seen them circulating on the news stands?

A. Yes.

Q. Have you ever in your committee literature made reference to this type of magazine?

A. Yes, I recall.

[fol. 474] Q. Was it favorable or unfavorable?

A. Sometimes we have had a number of magazines, and sometimes we have had comments, favorable and sometimes unfavorable.

Q. With particular reference to Playboy magazine, are the comments favorable or unfavorable?

A. We have had some of both.

Q. You mean that there have been some favorable comments with respect to Playboy magazine in your literature?

A. Yes, some few, but quite a number, of course, that were not so favorable.

Q. When you say that they are not favorable, what is the nature of the comment with respect to these magazines?

A. The big comment about many of these magazines has come from the nature of the story that is found within the covers of the magazine, and a picture of someone partially in the nude, often. By itself it isn't too offensive, but with some of the articles and stories that appear, for example—should I continue, or pause?

Judge McDermott: Yes.

Q. Go ahead,

A. In one of these magazines found in one of our schools [fol. 475] and a school not too far from here, along with a number of other magazines, and there was advice being given to teenage girls about courtship, and among other things it mentioned that they should have no fear of having intercourse with a young man before marriage; and, in fact, if they don't have, they are prudish, and they no longer need fear contracting a venereal disease because we now have drugs that would take care of such, but just in case a disease is contracted, and you are rendered sterile, the

magazine goes on to say that it may be a blessing in disguise because then you would not need to fear having a child if you would marry.

Q. This is Playboy magazine?

A. No.

Q. I haven't seen this other, but with particular reference to Playboy magazine.

A. I am sorry.

Q. Thank you.

Mr. Kleinman: I move that the answer be stricken from the record as not being responsive.

Mr. Osborne: At the very start of the answer he said, this type of magazine, and the answer was allowed to go [fol. 476] into the record completely, and I say that objection is not timely made.

Mr. Kleinman: If the Court please, I thought that he was talking about Playboy magazine.

Judge McDermott: Your question had to do with this type of magazine.

Mr. Kleinman: I referred specifically to Playboy magazine.

Mr. Osborne: We will stand on the record.

(Conference of the three panel judge court held at this time.)

Judge McDermott: Overrule the objection.

There is no question at the moment.

Judge McMahon: Had you completed your answer, sir, to the previous question?

The Witness: To that particular one, yes.

By Mr. Kleinman:

Q. How many motion picture films do you see in a year?

A. About 20 to 25.

Q. 20 to 25 films?

[fol. 477] A. Yes.

Q. You see them in a social way in an evening for entertainment?

A. That is right.

Q. Could you tell us what films you have seen in the last year?

A. Ben Hur.

Q. What others?

A. Imitation of Life, and that is more than a year ago, and more recently, of course, the three—those pictures portraying the scenes around the world, of course, by the newspaper and radio commentator, Lowell Thomas.

Q. Any others?

A. And the Dog of Flanders, and the Third Man on the Mountain, and Solomon and Sheba, and a number of others.

Q. Have you seen any film with Bridget Bardot?

A. Yes.

Q. Which one?

A. The one—I am sorry, but I can't think of it, but I saw it—not Solomon and Sheba—but—

Q. God Created Woman?

A. No.

Q. Love is my profession?

[fol. 478] A. No. It has a religious connotation. I am sorry, and I can't think of it at the moment.

Q. Did you see Room at the Top?

A. I did not.

Q. Did you see Bramble Bush?

A. No.

Q. Did you see Suddenly Last Summer?

A. No.

Q. Did you see Cat on a Hot Tin Roof?

A. No.

Q. Did you see Street Car Named Desire?

A. Yes.

Q. Have you seen any other obscene films other than The Lovers?

A. I have.

Q. In a public theater?

A. Yes.

Q. Do you know of the book Lady Chatterley's Lover, Professor Jordan?

A. I do.

Q. Have you read it?

A. Parts of it.

Q. Is it in your opinion obscene?

Mr. Osborne: Objection, if the Court please.

[fol. 479] Judge McDermott: Overrule the objection.

Judge McMahon: You may answer, Mr. Jordan.

By Judge McDermott:

Q. What do you say?

A. No, and yes.

By Mr. Kleinman:

Q. Very fine answers, professor.

Could you pick an answer between the two; yes or no? I assume, professor, as an expert in sociology that something is either obscene or not obscene?

Mr. Osborne: I object, and if he can't answer he should say so.

Judge McDermott: You are asking him to explain his answer?

Mr. Kleinman: Yes. Yes or no may mean maybe or not.

Judge McDermott: You can explain your answer.

A. There are many parts of the story which are very fine and nothing at all wrong with them, and a few places where it is a little bit on the spicy side, and that is true of Shakespeare, and at that point it is difficult to draw the [fol. 480] line, but I personally would say that it is obscene.

Q. You would say that it is obscene?

A. Yes.

Q. Isn't it a fact that the book describes in detail the sex act, in detail?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

Yes or no?

A. It does.

Q. Are you aware that this book circulates on the book shelves of the City of Cleveland public library and on the book stands?

A. I am.

Q. But it is obscene in your opinion?

Mr. Osborne: Objection to the repetition.

Judge McDermott: Yes or no, professor?

A. Yes.

Judge McDermott: Your answer is yes again?

A. Yes.

[fol. 481] Q. Professor Jordan, do you know where the Roxy Theater is?

A. Yes.

Q. Have you seen performances in the Roxy Theater, professor?

A. I have.

Q. In your opinion, is the exhibition there, professor, obscene?

A. Yes.

Q. Have you ever visited any of the clubs, aside from the Ctiy Club, on Short Vincent Avenue?

A. Yes.

Q. And have you seen performances there?

A. I have.

Q. And in your opinion are those obscene?

A. Yes.

Q. They are open to the public?

A. Yes.

Q. Are they presently operating?

A. I assume so.

Q. Before we get into the exhibits—

Judge McDermott: Are those A to E again?

Mr. Kleinman: Yes.

Q. May I ask, Professor Jordan, if in terms of the—[fol. 482] strike that.

May I ask if in determining what community standards are in answer to one of the questions put to you by Mr. Osborne you took into account those things that freely circulate in the community and those matters which are subjects of open discussion in the community—have you taken those things into account in determining whether this film meets with community standards?

A. Yes.

Q. Then, you have taken into account in your determination that the Roxy Theater puts on the kind of performance that you have referred to as obscene?

A. Yes.

Mr. Osborne: I will object, if the Court please.

Judge McDermott: Overrule the objection.

Q. You took that into account in determining what the community standard is?

A. Yes.

Q. Did you conclude from that that the community standard of such exhibitions is acceptable, professor, in this community?

Mr. Osborne: I will object, if the Court please.

[fol. 483] Judge McMahon: May we have that last question, please?

Judge McDermott: Read that last question, Mr. Sato.

(Question read back.)

Mr. Osborne: I wish to renew my objection.

(Conference held at this time among the three judge panel.)

Judge McDermott: Court feels that the question is proper, and that he may answer.

Mr. Osborne: May I ask that the question be repeated?

Judge McDermott: Yes, will you read it again, Mr. Sato.

(Question read back.)

Mr. Kleinman: I would like to restate the question.

Judge McDermott: Perhaps you could make it more precise.

Q. In making a determination of what the community standard is, in response to a question from Mr. Osborne, did you conclude that the fact that this exhibition takes [fol. 484] place at the Roxy Theater that it is acceptable in the community?

Mr. Osborne: That what is acceptable?

Mr. Kleinman: Such an exhibition.

A. It is acceptable.

Q. It is acceptable?

A. Yes.

Q. Did this have any effect upon your judgment, whether anything is or is not obscene?

A. Yes.

Q. And what effect did it have upon your opinion, professor?

A. More lenient, I presume, for consideration of what is obscene and what isn't.

Q. Now, at these exhibitions at the Roxy Theater, would you describe them?

Mr. Osborne: I will object, if the Court please.

Judge McDermott: You will bring him down to his latest trip there. Could you do it that way?

Mr. Kleinman: Yes, I will do that.

Q. The last exhibition that you saw at the Roxy Theater, [fol. 485] will you describe in general what takes place at the Roxy Theater?

A. Yes.

There are different comments made—dialogue—many of them between man and woman or—of course, they may be a bit suggestive at certain points, and then, of course, the main attraction, these girls do the strip tease acts, and girls who are beautiful, some of them, and some of them not so beautiful maybe, and depends upon your point of view.

Those girls come out with a very limited dress. Their protection is property, but that is about all, and then they start pulling off first one finger of a glove and then another finger, and after they go through two or three dances, which have their names, such as bump and screw, and so on, those are dances of the kind where they take off some more clothing, and finally wind up with not too much on.

If they would come on and pay no attention to anything else, two thirds of them could walk in and out within five minutes, and there wouldn't be too much to it, but the way that they build it up, they do it in such a way as to appeal to the prurient interests of the viewer.

Q. In other words, it is your opinion that the sole pur-
[fol. 486] pose of these exhibitions is to appeal to the prurient interests of those in the theater observing the performance, professor?

A. Yes.

Q. You stated that it depends upon your point of view as to whether or not any one of these women is beautiful?

A. Yes.

Q. Would you say that it depends upon your point of view whether this exhibition is obscene or not?

Mr. Osborne: I will object, if the Court please. This is putting the ultimate question that is before this Court, if the Court please, before this witness.

Mr. Kleinman: He just did it, if the Court please.

Mr. Osborne: I never asked once if such and such a thing could be obscene, and the record could be gone through from start to finish!

Mr. Kleinman: I will withdraw the question.

Mr. Osborne: I never asked the ultimate question in this way.

Judge McDermott: You may proceed, Mr. Kleinman.

[fol. 487] Mr. Kleinman: Thank you, your Honor.

By Mr. Kleinman:

Q. With the preface that I have given you, that the beauty of the woman depends upon the point of view of the one looking at her—

A. And under what circumstances.

Q. —and under what circumstances, would you say that it depends upon the point of view whether to the average person, applying contemporary community standards, the dominant theme of the material presented at the Roxy Theater appeals to the prurient interests?

A. Yes.

Q. Depends upon the point of view, does it not, professor?

A. I am sorry.

It would appeal to the prurient interests of the general public.

Q. The general public?

A. Yes.

Q. Is the appeal the same to women as it is to men, professor?

Mr. Osborne: I will object, if the Court please.

[fol. 488] Mr. Kleinman: He is an expert on the subject.

(Conference held of the three judge panel.)

Judge McDermott: Can you answer that?

The Witness: No.

Judge McDermott: You say you can't answer that?

The Witness: I can say what I think or what I know, and it has more of an appeal to men than to women, but few women attend, but many men do.

Q. How do you know that the appeal is greater to men than to women?

Judge McDermott: Do you know, professor?

Mr. Kleinman: He said that it has greater appeal.

A. The men, of course, are going there in order to be aroused sexually, and they would not be likely to go, at least not from time to time if it were not for that purpose, and women—some few women may go, but not many.

Q. Have you talked to these people that attend the [fol. 489] Roxy Theater?

A. I have.

Q. All of these people that you refer to, you say that men would go there to arouse their sexual desires. How do you know this?

Mr. Osborne: I will object.

Mr. Kleinman: But he did not answer.

Mr. Osborne: He was going along fine until you interrupted.

Mr. Kleinman: If I interrupted a question, do you want to answer that?

(Conference of the three judge panel held at this time.)

Judge McDermott: Court feels that he has already mentioned that.

By Judge McDermott:

Q. You based your answer based upon your observation of the percentage of men compared to women that attended, professor?

A. Yes, and on studies that I have made of the field also.

By Mr. Kleinman:

Q. May we go into these studies in the field that you have made.

[fol. 490] Q. What studies have you made in the field, professor Jordan?

A. It has been my privilege to read many of the articles and books that have been written in this field concerning the reasons why people attend certain kinds of shows.

Q. You mean, Professor Jordan, that you could give me a book that could tell what reaction the Roxy performance would have on somebody going to see the show; is that what you mean?

Mr. Osborne: Objection to that, if the Court please.

Judge McDermott: Let him answer, and he is talking about the average person of contemporary community standards.

A. Back in 1934—

Q. I don't like to interrupt, professor, but the question is whether you have made any studies?

A. Yes.

Q. Were these studies reading books?

A. And magazines.

Q. Did you make any clinical studies?

A. No.

Q. How many people did you interview along these lines?

[fol. 491] A. I presume 200.

Q. From what community were they drawn, these 200 people?

A. Cuyahoga County.

Q. And from these 200 interviews you have made a conclusion as to what would appeal to the prurient interests of the average man based upon contemporary community standards?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. Yes.

Q. Is it a fact that you did that from your interview of 200 people?

A. No, and my decision is based upon that in part only, and part of it on the reading I have done, and studies of the question.

Q. Well, based upon your experience, Professor Jordan, could you say what any reaction of any sexual stimulus on any of the people in this courtroom would have?

A. Are you—pardon me—are you referring to the Roxy?

Q. I am referring to any exhibition of matter to this audience. Could you tell what their reaction would be with-
[fol. 492] out asking them or observing it?

Mr. Osborne: I will object to that.

Judge McDermott: Just a moment, gentlemen. Don't answer that professor, just yet.

(Conference held of the three judge panel.)

Judge McDermott: That is a fair question we feel in view of the other questions and answers that have been made by him, and the questions put to him.

Overrule the objection.

A. It would be my feeling that it would appeal to the prurient interests.

Q. I am not referring to any particular matter. If I showed you a picture in this magazine, could you tell me by looking at the picture whether it would appeal to the prurient interests of any person in this courtroom?

A. I think so.

Q. You could tell if it would?

A. Yes.

Q. I hand you what has been marked for identification as Defendant's Exhibit A, Playboy magazine, and refer
[fol. 493] you to pages 44 and 45, and ask you whether the dominant theme of this material, based on contemporary community standards, appeals to the prurient interests of the average man?

A. I don't think so.

Q. You don't think so?

A. No.

Q. You don't think that it does?

A. No.

Q. I am sorry, and I don't get it.

Is your answer that you don't think that it does appeal to the prurient interests?

A. That is right.

Q. Do you know if it does?

A. A few cases, but the great majority it doesn't appeal to their prurient interests.

Q. The average man we are speaking of is the average man.

A. I wouldn't think so.

Q. You would think that it would not appeal to the prurient interests?

A. That is right.

Q. Can you tell me why?

A. Alone and apart from anything else, it looks like something that has been divinely created, and something [fol. 494] that is beautiful.

If you place it in with a lot of questionable reading matter and put in a lot of suggestive ideas, then it becomes something else again.

Q. This photograph of itself is what we are referring to, and this shows the naked body of a woman?

A. Yes.

Q. And it is God's creation, and it is beautiful; is that right, professor?

A. Yes.

Q. The sex act is also God's creation; is it not, professor?

A. That is right.

Q. I hand you now what has been marked for identification as Defendant's Exhibit B, February, 1960, issue of Gent magazine, and refer you to the bottom pictures on the left-hand page, 34, and left-hand picture, page 35.

With reference to the appeal to the prurient interests of the average man, would you say that that is an appeal to the prurient interests of the average man?

A. No.

Mr. Osborne: You have answered the question, doctor.

[fol. 495] Q. This shows a partially draped, or partially undraped, body of a female?

A. Yes.

Q. And this is not an appeal to the prurient interests of the average man?

Mr. Osborne: Objection, if the Court please.

Q. Are you basing this test on your own reaction to the picture, or the average man?

A. Average man.

Q. And this is based upon your observation of two hundred cases?

A. I did not say that.

Judge McDermott: He did not say 200 cases.

Q. 200 people that you have interviewed?

A. Yes.

Mr. Osborne: But he said that he did not make this determination solely and only on that basis.

Q. Here is Defendant's Exhibit C.

Referring you to page 24, picture on the right-hand section of page 24, would you say to the average man, based upon contemporary community standards, that the dominant theme of this is an appeal to the prurient interests, [fol. 496] and rather suggestive pose, isn't it?

A. Yes.

Q. But there is no appeal to the prurient interests, professor?

A. No.

Q. What would you say would be the dominant appeal of this material?

Mr. Osborne: I must object to the terminology. Dominant theme we have, but we don't have a dominant appeal.

Q. What is the dominant theme of this material, professor?

A. Some of the magazines—

Q. Wait a minute, Professor Jordan, and make that the Playboy magazine, Gent magazine, and the Rogue magazine that I am handing you now.

Q. What is the dominant theme of that material, professor?

A. Sex.

Q. Sex, and obscenity and sex, and those are synonymous, professor?

A. Not necessarily so.

Q. So that a film may deal with sex without being obscene; may it not?

A. Correct.

[fol. 497] Q. And there are many films today that deal with sex; are there not?

A. Correct; such as normal births, and human reproduction, and a number of very good films that do with sex --that deal with sex, but they do not appeal to the prurient interests, and I saw two of these films just yesterday.

Q. Did you see Room at the Top?

A. No.

Q. I don't remember if you answered that question before, professor.

A. I didn't see that one.

Q. Now, did you see any themes in the movie entitled, "The Lovers"?

A. Yes.

Q. Would you describe some of them for us?

A. Ones that I previously described, such as the scene at the polo grounds, and the scene in the boat, and the scene in the bathtub, and the scene in the bedroom, and those scenes were all scenes which sort of stand out, it seems to me.

Q. As appealing to the prurient interests?

A. Yes.

Q. Theme of adultery in the film?

A. Yes.

[fol. 498] Q. This theme doesn't have any appeal to the prurient interests; does it?

A. No, if used alone.

Q. Adultery is openly discussed these days; is it not, professor?

A. Yes.

Q. Matter of public discussion?

A. It is.

Q. Isn't the dominant theme of the film, "The Lovers," the adulterous relationship?

A. Yes, but more than that.

Q. I have asked you whether the dominent theme of "The Lovers" is the adulterous relationship?

Mr. Osborne: If the Court please, he has already answered that question.

Mr. Kleinman: He said, yes.

Mr. Osborne: He also said "but more than that."

The Witness: Appeals to the prurient interests.

Q. The dominant theme of adultery appeals to your prurient interests?

A. No.

Q. Did you observe the map at the beginning of this film?

[fol. 499] A. Yes.

Q. Is there an appeal to the prurient interests in the map?

A. Yes.

Q. Would you describe the appeal to the prurient interests in the map?

A. It gives you the impression that here is a man and a woman about to engage in the sex relationship.

Q. You saw this in the map?

A. Imagination.

Q. Oh!

This was in your mind when you saw the map, professor?

A. And it was in my mind when I saw the map.

Q. When you saw the map?

A. Yes.

Judge McDermott: That is his answer, gentlemen, and it is for the Court with all the other evidence.

Mr. Kleinman: No further questions, if the Court please.

Judge McDermott: Now, Mr. Prosecutor.

Mr. Osborne: Just one or two questions.

[fol. 500] Judge McDermott: Wil you get through with the doctor tonight?

Mr. Osborne: Just a moment, please.

(Conference held at this time between Mr. Osborne and Mr. Stuplinski, and held off the record.)

Mr. Osborne: Yes, we will be through with him today.
Judge McDermott: All right, gentlemen, let us proceed.

[fol. 501] Redirect examination of Millard Jordan.

By Mr. Osborne:

Q. You have been asked about the map on cross-examination at the beginning of the film.
A. Yes.
Q. Would you tell us upon what you base your opinion that it suggests that a woman and a woman would have sexual intercourse?

Mr. Terrell: I object about his leading the witness.
Judge McDermott: Yes.
Mr. Terrell: He has led the witness all the way through.
Judge McDermott: Reframe the question.
Mr. Osborne: Reframe the question?
Judge McDermott: Yes.

Q. You were asked by Mr. Kleinman about the map in the film?
A. Yes.
Q. And you were asked whether or not it had an appeal to the prurient interests. As I recall, you said that it in-
[fol. 502] dicated or suggested that the man and woman were to have intercourse?

Mr. Terrell: I objected to that before, and the Court sustained me, and now he said the same thing exactly, and let him give that on direct examination.
Ask him about the map.
Mr. Osborne: Will you let me conduct my own examination?
Mr. Terrell: Do it the right way.
Mr. Osborne: We went to school together. You know that.
Mr. Terrell: You mean with the professor, too?
Judge McDermott: Let's get through tonight, gentlemen.

By Mr. Osborne:

Q. Will you describe the map, please?

A. Not too clearly at the moment, but the area of the lake and the river and the stream, and so on, and it kind of gives you the impression that there is something that is leading up to the sexual relationship.

Q. Now, upon what do you say gives the suggestion that it is leading toward sexual relationship?

[fol. 503] A. Outline of the drawing of the lake, and this stream, and the lake, and the way that they are related to each other.

Q. I see.

What does it show, if anything? What does the map suggest, if anything, in the physical world?

A. Sex.

Q. All right.

And specifically?

A. Intercourse.

Q. Pardon?

A. Intercourse.

Q. And does it suggest any specific type of physical thing?

A. It does.

Q. And what is that?

A. Sex relationship.

Q. I see.

Are you referring to the physical act of the sex relation?

A. Yes.

Q. All right.

Judge McDermott: Anything else, gentlemen?

Mr. Osborne: No further questions of this witness, your [fol. 504] Honor.

Judge McDermott: Defense all through with this witness?

Mr. Kleinman: Just a moment, your Honor.

(Conference off the record held at this time between Mr. Terrell and Mr. Kleinman, counsel for the defense.)

Mr. Kleinman: I have just one more question.

Judge McDermott: Only one?

Mr. Kleinman: Yes.

Judge McDermott: Proceed, and let us finish up with this witness tonight if we can.

[fol. 505] Recross examination of Millard Jordan.

By Mr. Kleinman:

Q. Are you aware, Professor Jordan, that this map hangs in one of the outstanding museums in the world?

A. No.

Q. The original of this map?

A. No.

Mr. Kleinman: No more questions.

Judge McDermott: Dr. Jordan can go for tonight, gentlemen?

Mr. Kleinman: Yes.

Mr. Osborne: Yes.

Judge McDermott: Could you all be here 9:15 in the morning, sharp, gentlemen?

(At this time court convened for the day at 5:05 P. M. until tomorrow morning, May 27, 1960, at 9:15 A. M.)

[fol. 505a] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 507] Friday morning, May 27, 1960, at 9:30 A. M.

The Court: Ready to begin, gentlemen?

Mr. Osborne: Yes, your Honors. We will call Mr. Hart.

Judge McDermott: Mr. Bailiff, will you call Mr. Hart, please?

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called as a witness HENRY HART, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Henry Hart.

By Mr. Stuplinski:

Q. For the record, sir, your name is Henry Hart?

A. Yes.

Q. Do you spell your last name H-a-r-t?
A. Yes.
Q. Mr. Hart, will you give us your address?
A. 458 Hicks Street, my home?
[fol. 508] A. Yes.
Q. 458 Hicks Street.

Mr. Terrell: Please speak up as I can barely hear you.
Mr. Stuplinski: Speak a little louder, Mr. Hart.
The Witness: Surely.

Q. Will you give us your address again, please?
A. 458 Hicks Street..
Q. And what is your business or profession?
A. Editor of Films in Review.
Q. And as such, sir, do you have a business address, Mr. Hart?
A. 31 Union Square, New York City.
Q. You indicated that you are editor of Films in Review?
A. Yes.
Q. What is Films in Review?
A. Monthly magazine devoted to the motion picture, to every serious aspect of it.
Q. And who publishes this magazine?
A. National Board of Reviews of Motion Pictures.
Q. And what is the National Board of Reviews of Motion Pictures?
A. It is a public non-profit organization, devoted to the [fol. 509] public interests of the motion picture, and to arouse public interest in the motion picture.
Q. And Films in Review is a monthly publication, Mr. Hart?
A. Yes, comes out ten months a year, and the June-July and August-September issues are combined.
Q. And what is the circulation of this magazine, Mr. Hart?
A. Averages 4,500, and it varies between 4,200 and 4,700.
Q. And to whom does this magazine go?
A. Only to people interested in movies professionally, or as a hobby, or as an intellectual interest.
Q. And where are the majority of the people who are subscribers to this magazine?
A. Bulk is in New York City and Hollywood, the Hollywood area.

Q. I see.

A. But goes all over the world, and libraries, and institutions, of which we have more than 500, I think. About 500.

Q. I see.

As editor of this magazine, what is your function or duties relative to the magazine in general, Mr. Hart?

[fol. 510] A. It is to obtain the material which we publish, to review magazines—excuse me—to review films, to review books that deal with those things, and obtain articles on every aspect of the movie, both craft aspects and sociological aspects, and esthetic ones also.

Q. And as editor of this magazine, do you participate in the writing of any articles for the magazine, Mr. Hart?

A. Yes.

Q. Mr. Hart, can I ask you how long you have been editor of Films in Review?

A. 10 years.

Q. And during the 10 years, have you written articles for the magazine?

A. Yes.

Q. And before that 10 years, before you became editor of Films in Review, may I ask what you did, Mr. Hart?

A. Immediately before read manuscripts for MacMillan.

Q. What is MacMillan's?

A. Book publishers.

Q. Book publishers?

A. Yes.

Q. In New York?

[fol. 511] A. Yes.

Q. All right.

Will you go back now?

A. Before that, I wrote for Fortune magazine, and before that for Time magazine.

Before that, I read manuscripts for MacMillan, and before that, editor in chief for Putnam Sons, book publishers, and before that publicity director for Charles Scribner & Sons.

Before that, reporter on the Philadelphia Recorder—excuse me—Philadelphia Record.

Q. And you have mentioned that you read manuscripts, Mr. Hart?

A. Yes.

Q. What did that involve, and why did you read manuscripts?

A. To give an opinion upon their publication.

Q. And what did you do when you worked for these other magazines, Mr. Hart?

A. For Fortune I did all kinds of stories, corporation stories, political articles.

Q. And for Time?

A. For Time I wrote on business and finance.

Q. And how long have you been involved in work pertaining to the motion pictures?

[fol. 512] A. Well, I have been interested in the motion picture all my life.

In the early thirties I joined the committee on exceptional films of the National Board of Reviews, which consists of people that are seriously interested in movies, and each year pick the ten best, and endeavor to promote everything that is of interest and that is good about the movies.

That was done, of course, while I was working in books and with the magazines.

In 1950, when the Board decided to publish a monthly magazine, that is when I became exclusively interested in movies.

Q. And over a period, let us say a year or so, how many movies do you see in your professional capacity, Mr. Hart?

A. I would guess between 200 and 300 a year, approximately.

Q. You have been doing that for 10 years? Would that be a fair statement?

Mr. Osborne: Let the record show that he is nodding his head, yes.

Judge McMahon: Let the record show that.

The Witness: I am sorry.

[fol. 513] A. Excuse me.

Yes.

Q. Did you have occasion, Mr. Hart, to see a motion picture entitled Les Amants, or "The Lovers"?

A. Yes, I did.

Q. And may I ask where you saw that particular movie, Mr. Hart?

A. Screening room, and I can't remember where it was in New York City.

Q. And you have more than one in New York City?

A. Yes, quite a number of them.

Q. Pardon me.

What is a screening room, Mr. Hart?

A. Room where movies become projected either by the distributor, or room that was hired to shew movies to reviewers, or the theater manager may do that, and those are the various ways.

Q. Is this a fair statement? Does that usually happen before the motion picture is shown to the general public?

A. Yes.

Q. And as such, you come in contact with other movie critics and managers of theaters, and so on?

A. I rarely see the managers of the theaters, but I usually see other critics.

[fol. 514] Q. Speaking of critics, sir, do you know a man by the name of Ward Marsh?

A. Yes.

Q. Can you tell us who he is?

Mr. Kleinman: Objection, if the Court please.

(Conference of the panel of three judges held at this time.)

Judge Pincura: Mr. Marsh has been identified.

Mr. Stuplinski: I will withdraw the question.

Judge McDermott: He has withdrawn that.

Mr. Marsh's identity is in the record already, and he was here yesterday, and he testified at length.

Q. I take it that you know Mr. Marsh is a motion picture critic?

Mr. Kleinman: Objection.

Judge McDermott: Overruled, and he may answer if he knows.

A. Yes, I do.

Q. And do you have the means of knowing Mr. Marsh's reputation among motion picture critics?

[fol. 515] Mr. Kleinman: Objection, if the Court please, as to this line of questioning about Ward Marsh, and I would like to enter a general objection, so as not to interfere with the questioning.

(Conference of the three judge panel held at this time.)

Judge McDermott: Court will sustain further questioning about Mr. Marsh along those lines, and he was identified here yesterday.

Mr. Stuplinski: We will go on to something else then.

Q. Mr. Hart, after viewing the motion picture, "The Lovers," in the screening room, did you, sir, form an opinion about the artistic merit or dramatic quality of the movie?

Mr. Kleinman: Objection.

(Conference held of the three judge panel.)

Judge McDermott: Overruled. Yes or no only.

The Witness: Yes.

Q. Did you express that opinion in any form?

A. Yes.

[fol. 516] Mr. Kleinman: Objection.

Judge McDermott: Overruled.

Q. May I ask in what manner you expressed that opinion?

Judge McDermott: Don't answer that just yet, Mr. Hart.

(Conference of the three judge panel held at this time.)

Judge McDermott: The last question, will you read that back please, Mr. Sato?

(Question read back.)

(Conference of the three judge panel held.)

Judge McDermott: The Court will overrule the objection.

Q. Do you remember the question, Mr. Hart?

A. No.

Mr. Stuplinski: Mr. Sato, will you please read the question back for Mr. Hart at this time?

(Question read back.)

Q. Will you please answer?

A. Yes, I did.

Q. May I ask where did you express that opinion, Mr. Hart?

[fol. 517] Mr. Kleinman: If the Court please, I would like to explain my argument.

Judge McDermott: Proceed, Mr. Kleinman.

Mr. Kleinman: He saw the film in New York, and he did not see State's Exhibit 1-A and 1-B in this courtroom, and I don't know if he has seen this film that has been shown in the Heights Art Theater.

I am willing to waive my objection if the film in New York and here was the same, but a film can be cut, and I don't know what he saw.

Judge McDermott: Are you able to say, Mr. Prosecutors, that you will tie up this testimony with these particular exhibits in this case?

Mr. Osborne: Yes.

Mr. Stuplinski: Yes, your Honor.

Judge McDermott: You say that you can tie that up with these particular exhibits that have been admitted, the film in question?

Mr. Osborne: Yes, we can.

Mr. Terrell: May we be given the right to ask one ques-
[fol. 518] tion about the qualifications of this man?

Judge McDermott: Now?

Mr. Terrell: Right now.

Judge McDermott: Just a minute, and let us go along here.

(Conference of the three judge panel held at this time.)

Mr. Terrell: Right now?

Judge McDermott: Yes.

By Mr. Terrell:

Q. Did you see the picture, "The Lovers," here in Cleveland, Mr. Hart?

A. No.

Mr. Terrell: That is all there is to it, and he saw something different than State's Exhibits 1-A and 1-B.

Mr. Osborne: Just a minute, and you took depositions in New York.

Mr. Terrell: Now—

Judge McDermott: The prosecutors said that they would tie up this testimony with the exhibits.

Mr. Terrell: We have proven that he can't do that, and that is the reason for that one.

[fol. 519] Judge McDermott: You haven't proven anything about that, and they still have that opportunity.

Mr. Terrell: If they are willing to waive as far as our critics are concerned, we will go along.

Judge McDermott: You will have a chance to cross-examine at length when you come to it, and the prosecutor said that he would connect that up with these exhibits, and let us have some orderly procedure here, gentlemen, and it is admitted that these exhibits were used in this state and county.

Mr. Terrell: Yes, but he did not see that.

Judge McDermott: You may have your exception.

By Mr. Stuplinski:

Q. Handing you what has been marked for purposes of identification as State's Exhibit 5 and more particularly State's Exhibit 5-A, will you please identify State's Exhibit 5-A?

Mr. Osborne: 5-B, too, Bernie.

[fol. 520] Q. Yes, I have that in mind.

Will you identify State's Exhibit 5 first?

A. November, '59, issue of Films in Review.

Q. And is this—

A. It contains the review of "The Lovers" which I wrote.

Q. State's Exhibit 5-A and State's Exhibit 5-B, will you identify the article in the right-hand, lower right-hand?

A. That is my review of The Lovers.

Q. That article is unsigned?

A. Yes.

Q. You wrote the article?

A. I did.

Q. Now, the motion picture, "The Lovers," that you saw in New York, Mr. Hart, can you tell us who that was directed by?

Mr. Kleinman: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: If he knows, he may answer. Overruled.

A. By Louis Malle.

Q. And do you know who was the distributor of this motion picture?

[fol. 521] Mr. Kleinman: Objection.

Judge McDermott: Overruled.

A. I think that it is Zenith, but I am not quite sure.

By Judge McDermott:

Q. Zenith what?

A. I don't know the corporate name, but I think it is Zenith Distributors.

Mr. Kleinman: Zenith International.

Do I understand that the Court has entered a general objection to these questions?

Judge McDermott: Let the record show that you have done that, and still continue your general objection.

Mr. Kleinman: Thank you.

Q. Mr. Hart, will you briefly outline the story of "The Lovers" that you saw in New York?

Mr. Kleinman: Objection.

Judge McDermott: Overruled.

He may answer.

A. It is the story of a French woman, who, having one lover, takes on an archeologist that she picks up along

the road, and they decide to go off together, and that, briefly, is the story.

[fol. 522] Q. You have said that you have an opinion about the artistic merit or the dramatic quality of this motion picture, Mr. Hart—

A. Yes.

Q. Will you state what it is?

A. It has no artistic value whatsoever, and it is highly inadequate as a dramtic piece of writing and as a movie.

It is inadequate dramatically because the characters are wholly unmotivated, and most of the situations are merely artificial and keep the viewer bumping along.

The disharmony between the married couple is never elucidated, and the reason for the cooling off of the polo player interlude is not given, and meeting the second lover on the road is rather improbable, and also introducing him into the household when the husband and the other lover are there in the house is outre.

Judge McDermott: What was that word you used?

Mr. Hart: Bizarre.

Judge McDermott: No, not the definition, but the word itself.

Mr. Hart: Outre.

[fol. 523] Judge McDermott: Thank you. You may proceed, Mr. Hart.

A. Outside of the normal course of events, I think one can't look at "The Lovers" altogether in isolation. It comes out of a climate of opinion and commercialism current in France now in which many of the directors, the young directors, exploit sex, violence, perversion, on the ground that that is all that will make money nowadays, and this picture is certainly an example of it.

If one were to analyze it scene by scene, I think the conclusion is inescapable that the whole purpose is to lead up to the one scene of perversion, and that all the rest is merely decor to enable people to look at it and not be altogether ashamed to go to see that.

Artistically, now and then it has a little bit of things that are pleasing, and there are some nice photographic shots now and then.

Once in a while there is something on the sound track that is good music.

The sets and the costumes are done with fair taste, but not exceptional in any way.

The integration of it is very faulty.

I think that without the one scene of the perverted act, all the word of mouth that has accounted for the picture's [fol. 524] box office—whatever box office success it has—without that one scene I think it would have gotten no attention whatsoever, and would certainly not have gotten the reviews that it had gotten in some of the New York papers.

Q. Finished with your answer now, Mr. Hart?

A. Yes.

Q. Well, let me ask you this:

As a motion picture critic for so many years, what is the basic purpose of a motion picture?

A. What do I think was the basic purpose for making this picture?

Mr. Kleinman: Objection.

Q. Not this picture but any picture.

A. What is the basic purpose of making a motion picture?

Q. From an artistic standpoint. Do you understand my question?

A. No, I don't.

Q. I will see if I can reword the question, Mr. Hart.

Let me ask you this, Mr. Hart: What are the basic essentials of drama?

A. Well, conflict is one without which you have no drama, and in a good dramatic performance there should occur [fol. 525] something that is on the—the technical word is catharsis, and something should happen to the viewer.

The conflict that is depicted should have a resolution, and in having a resolution it should produce an effect upon the beholder of that conflict, so that the conflict that he has been witnessing leads up to an occurrence within him, and he sees that the human suffering or human exploits has lead to a residue in the mind, or experience which aids and enlarges, or which re-emphasizes something that is already known, and in which a good dramatic performance affects the beholder and enriches him, and it should—and that is

really the prime criterion, and without that catharsis, and without the results of that conflict in meaningful terms, the whole thing is just so much wasted effort.

Now, in the case of The Lovers, since no theme is—

Mr. Kleinman: Objection, if the Court please, and this is not responsive to the question.

Judge McDermott: Strike out and disregard what Mr. Hart said in the latter part.

Q. In view of this explanation, Mr. Hart, will you take [fol. 526] into consideration the motion picture, "The Lovers," and comment on that?

A. Well, The Lovers has no theme at all, and as I said it consists of the one episode to excite the beholder, and the fundamental situation of the man and the wife and the reasons for their disharmony are not stated.

The reason that it happened to be a polo player is not given.

The reasons for her being in such a psychological imbalance that she would take up with a man she meets on the road are not given, and the events that transpire on the night in question are highly improbable.

I think that anyone who knows what is going on in French movies, that the French are tired of the eternal triangle—

Mr. Kleinman: Objection to that latter, if the Court please.

Judge McDermott: Yes, the latter part will be stricken and disregarded by the Court.

Q. Mr. Hart, have you heard of the expression the "New Wave" as it is applicable to French movies?

A. Yes.

Q. Will you define that for us, or explain it?

[fol. 527] Mr. Kleinman: Objection.

A. It is a piece of—

Mr. Kleinman: Objection.

Judge McDermott: Before you answer that, Mr. Hart, just a moment.

(Conference held of the three judge panel Court.)

Judge McDermott: Court feels that there is some remote relevancy and will overrule the objection.

The Witness: May I go ahead and answer?

Judge McDermott: Yes, Mr. Hart. You may answer.

A. It is nothing but a publicity phrase cooked up to describe the young directors who make pictures in France, and the pictures deal with delinquents and hoodlums, and sex preoccupied people and subject matter that is utterly worthless, and then all they have is a lot of energy, directorial energy, but their pictures are commercially successful solely because they exploit the psychology of the criminal and the variant; and if you turn a moral concept upside down and appear on the screen to sympathize with the evil doer, to engender in the audience a certain amount of excite-
[fol. 528] ment because their attitudes are being challenged, and they are being asked to think that what they thought was wrong is all right, and that, at the bottom, is what the new wave exploits, and it takes a known hood and asks you to sympathize with him, instead of some young man who is leading a constructive life.

The phrase "New Wave" is a mere publicity tag and has no other meaning.

Q. How does the motion picture, The Lovers, fit into this new wave?

A. Malle is considered one of the new wave, and it is a cloak that you have a phrase that people don't really understand, and you use it as a cloak for a picture such as The Lovers, and I suppose enables those that really want to see a pervert act depicted could see it and think that they are seeing something that is superior.

Q. And The Lovers, how does that fit into this new wave, would you say?

A. Well, I don't know how to answer you.

Q. I will withdraw that question.

Mr. Hart, I will ask you now, in your opinion as a motion picture critic, what do you think of the photography as you saw it in The Lovers?

A. Well, it is just ordinary photography except for the
[fol. 529] few shots in which—every picture has a few shots

in it usually, and there are some that don't, and the photography has no great distinction.

Mr. Stuplinski: I have no other questions, and you may inquire.

Judge McDermott: Now, gentlemen, for the defense.

[fol. 530] Cross examination of Henry Hart.

By Mr. Kleinman:

Q. I take it that there was very little about The Lovers that you enjoyed?

A. Very little.

Q. How about the map at the beginning of the picture? Do you recall the map?

A. Now that you have mentioned it, I do, vaguely.

Q. Did it give you any impression of the film, Mr. Hart?

A. No.

Q. You vaguely recall it?

A. Yes.

Q. You don't recall that there was particularly any sexual connotation to that map?

A. No.

Q. None at all?

A. No.

Q. You have spoken of sex in the new French movies. Is this exclusively a manifestation of French movies, Mr. Hart?

A. No.

[fol. 531] Q. It is pretty much common in American movies?

A. The degree of preoccupation,—

Q. I asked the question, yes or no.

Mr. Osborne: Let him answer the question.

Judge McDermott: Wait a minute. Read the question, Mr. Sato, and if it calls for a yes or no we will see.

(Question read back.)

(Conference held at this time among the three judge panel.)

Judge McDermott: Let him finish his answer.

A. —with the more objectionable phases of sex, and especially with sexual perversion.

Hollywood hasn't gone into it yet, and it is beginning, but it hasn't reached the stage that the French have as yet.

Q. In other words, this is merely an advance step ahead of Hollywood entering the field, into which Hollywood is now getting?

A. And I hope that Hollywood will not get.

Q. But "Suddenly Last Summer" deals with perversion, does it not?

A. Yes, but no pervert act is shown.

[fol. 532] Q. Did you see a pervert act in The Lovers?

A. I did.

Q. You saw it?

A. I did.

Q. Did you see any part of any human body nude below the waist?

A. May I describe—

Q. I asked if you saw any part of a human body nude below the waist?

Judge McDermott: Yes or no, you may say, Mr. Hart.

A. No.

Q. You said no?

A. No.

Q. Now, you have spoken also with respect to the preoccupation with delinquents and sex and hoodlums, have you not?

A. Yes.

Q. Are these matters with which you take issue with the producers of the movies, and you don't feel that these are matters that the producers should concern themselves with?

A. I certainly do not.

Q. You don't think that they should concern themselves with these matters?

[fol. 533] A. I certainly do not, in a neutral way, and if they want to show evils thereof, yes, but not otherwise.

Q. In other words, there must be a retribution for the evil doer?

A. There must not only be a retribution for the evil doer, but the whole tenor of evil should be on society's side.

Q. Would you say, then, carrying that a step further, that if a film is made that advocates socialism, that this is an improper subject for the film to deal with?

A. Not at all.

Mr. Stuplinski: Objection.

Judge McDermott: The answer is already in the record.

Mr. Stuplinski: Withdraw our objection.

Judge McDermott: Proceed, gentlemen.

Q. Did you see "Cat on a Hot Tin Roof"?

A. Yes.

Q. Did you see "Street Car Named Desire"?

A. Yes.

Q. These are American movies; are they not?

A. Yes.

[fol. 534] Q. Did you see Baby Doll?

A. Yes.

Q. Did you see Summer Place?

A. Yes.

Q. These all deal with sex, don't they?

A. Yes.

Q. Almost preoccupation of sex; are they not, Mr. Hart?

A. Yes.

Q. Did you see "Peyton Place"?

A. Yes.

Q. Did you read "Lady Chatterley's Lover"?

A. Yes.

Q. Is "Lady Chatterley's Lover" on the side of society, as you put it?

A. No.

Q. Then, your view of motion pictures is that anything that is not on the side of society is something that motion pictures should not deal with?

A. That is something that I cannot subscribe to, not the way that you put it.

Q. How would you put it?

Mr. Osborne: Just a minute, and let him finish his answer.

Judge McDermott: Finish your answer, Mr. Hart.

[fol. 535] A. I believe that there is nothing that you cannot put on the screen, and there is no subject matter that you cannot put on the screen, and the whole thing is the way that you do it.

Now, there is nothing in any of the pictures that you have just ticked off which is on the side of society or on the side of the individual human being that will make them richer and better.

Hence, I think the picture should be so characterized, as deleterious.

Am I answering what you want?

Q. Yes, I think so.

Well, then, Mr. Hart, just to test further this theory of yours, is there anything in Mein Kampf, by Adolph Hitler, that is on the side of society?

Mr. Osborne: I will object.

Judge McDermott: Overrule the objection.

A. Is there anything in it that is on the side of society?

Q. I mean in the terms that we are talking about, the things that are good for the humanity and the public?

Mr. Osborne: You have not asked him if he has read it. [fol. 536] Judge McDermott: Mr. Prosecutor, let the examiner alone, unless you feel that he is stating something that is not pertinent.

Go ahead, please.

A. I can't recall it; but there might have been occasionally something that is said that is good for human beings, and I don't really recall, but certainly the man's creative drive in there is not on the side of life; certainly.

Q. Then, you under your hypothesis that you propose would object to the distribution of such a book?

A. There is a difference between a book and a film, and the difference is that a picture, and especially a motion picture, is ever so much more powerful emotionally, and it produces a greater effect on a greater range of people.

I would not—to answer you, I would not—did you ask me if I thought such a book should not be published?

A. I think that you have answered the question as far as I am concerned.

Q. You say that the effect of a motion picture is more powerful than a book?

A. Yes.

[fol. 537] Q. But it is also less lasting?

A. Who knows?

Q. Well, you can pick up a book and reread the same portions.

A. You speak of a lasting effect.

I can remember scenes which affected me that I saw in movies forty years ago.

Q. How about movies with a prurient effect? Did this pruriency continue long after the pruriency was over?

A. It could.

Q. Well, in "The Lovers," did this appeal to your prurient instincts?

Mr. Osborne: Objection.

Judge McDermott: Objection overruled.

A. I look at movies professionally, and when I saw that scene I thought that they really crossed the line of this one, and that was my reaction.

Q. Your personal reaction?

A. Yes.

Q. Now, you object to the film because it refers to, or in your mind at least, displays a pervert act?

A. That is the reason that I object to it.

Q. Is that the only objection that you have to the film, [fol. 538] other than the fact that you might not have liked it?

A. I might have small technical objections to other little things in it, but that is the reason that I think the community is entitled to say that we don't want this to be shown.

Q. It should be the community that should say that we don't want this to be shown?

A. Certainly.

Q. How would the community know whether they want it to be shown if they haven't seen the film?

Mr. Osborne: I will object.

Mr. Kleinman: I will withdraw the question.

Judge McDermott: All right.

Q. You spoke of the commercialism in sex?

A. Yes.

Q. As an expert in the field of films and observer of the films you have mentioned, can you account for the fact that movies dealing with sex make money?

A. Of course, I can, because sex is of interest to everybody.

Q. And they accept it as a subject of public discussion, do they not?

A. They are getting to more and more.

[fol. 539] Q. And even in matters of perversion, homosexuality, and the like, they are matters of public discussion and appear in the press?

A. Yes.

Q. People are interested in sex?

A. Yes.

Q. And that is why they go to see films dealing in sex?

A. There is nothing intellectually interesting in sex which accounts for them going to see it, but it is a prurient interest.

Q. Is there a theme of adultery in this film?

A. Yes; not a theme, but adultery is depicted.

Q. Are there any themes in the film?

A. I don't think so.

Q. Do you know Bosley Crowther of the New York Times?

A. Yes.

Q. Do you know him personally?

A. Yes.

Q. Would you state what his standing is in the field of motion picture critics?

A. I think he is the best newspaper reviewer in the country.

Q. Do you know what he said about "The Lovers"?

[fol. 540] A. I don't really know, but I think he liked it; didn't he?

Q. I think he liked it.

Do you know that he picked that as one of the ten best foreign films of the year '59?

A. I will buy it if you say so.

Q. Do you know how he arrives at his conclusions about what he believes about a film?

A. No.

Q. Would you say that he is an outstanding movie critic?

A. I think he is the best newspaper critic in the country.

Q. Well, excepting yourself, are there any better critics than Bosley Crowther?

A. Do I have to answer that?

Mr. Stuplinski: I will make an objection.

Judge McDermott: Now, gentlemen.

Mr. Kleinman: I didn't mean to be sarcastic, but I merely wanted to establish the status of Bosley Crowther.

Judge McDermott: The question is unfair.

Mr. Kleinman: I will withdraw the question.

[fol. 541] Q. Are you familiar with a lady by the name of C. A. Lejeune?

A. Yes.

Q. Writes for The Observer?

A. I don't know her, but I know her reputation.

Q. Do you know of her standing in the community as a motion picture critic?

A. Yes.

Q. Is it high?

A. Yes.

Q. Do you agree with these words contained in the review that she wrote in The Observer, Sunday, November 1, 1959:

"A graceful film. An elegant film. I like it very much indeed. And the oddest thing is that with all its license the quality I remember most is purity."

Q. Do you agree with that?

A. I do not agree with that.

Q. Do you know who writes the reviews for Newsweek Magazine?

A. No, I don't.

Q. Do you know Georgia Hess?

[fol. 542] A. No. I don't think I do.

Where is she?

Q. San Francisco Examiner.

A. No.

Q. You don't know of her at all?

A. No.

Q. Do you know Hollis Alpert?

A. Yes.

Q. What do you know about Hollis Alpert as to his status as a movie critic?

A. Well, I don't know very much about his status. He writes for the Saturday Review.

I don't always agree with him. I think he has fixations.

Q. Pardon?

A. Fixations or predilections, or preoccupations.

Q. We are speaking not of his personality but his status as a reviewer.

A. I mean in his reviews. He has taken these—he has these preconceptions and predilections and so forth.

Q. But the Saturday Review—do you know the Saturday Review?

A. Yes.

Q. Do you know Mr. Cousins, the editor?

[fol. 543] A. Yes.

Q. Do you consider Saturday Review an outstanding magazine?

A. If you use the word "outstanding" as one of unvarying excellence, I certainly do not. I think that it is inadequate, and sometimes it has good things, and sometimes very bad ones.

Q. Do you agree with these words from Mr. Hollis Alpert's review in the Saturday Review:

"It is the always evident sincerity and seriousness, which protect against the sleazy and the sensational. Lovemaking there is, and it is as explicit as anything ever done before on the screen, but one senses that it is not shown for the sake of providing a cheap, vicarious thrill, but so that we may be privy to what Malle obviously considers the most meaningful and symbolic moment in the lives of two people."

Q. Do you agree with that opinion?
A. I think that is highly disingenuous.

By Mr. Osborne:

Q. Disingenuous?
[fol. 544] A. Yes.

Mr. Osborne: Thank you.

By Mr. Kleinman:

Q. Do you know Paul Beckley?
A. I know who he is.
Q. New York Herald Tribune?
A. Yes.
Q. What is his reputation in the field of motion picture critics?
A. I think he is regarded as a rather immature critic.
Q. Immature?
A. Yes, immature.
Q. H. H. Wyler, do you know him?
A. New York Times?
Q. Yes.
A. I don't know him, but I know the sort of thing that he writes.
Q. Do you know Mr. Genet of the New York?
A. Genet?
Q. Yes.
A. That is a pen name for a woman named Janet Flanner.
Q. Do you know her?
A. I have met her.
Q. What is her reputation?
[fol. 545] A. I have known about Janet Flanner and everybody knows about—
Q. And her—

Mr. Osborne: Let him answer the question.
Mr. Kleinman: I am asking about her reputation as a critic.

A. I don't think that anyone pays very much attention to her.

Q. What about John McCarton of the New Yorker?

A. He is a highly intelligent man whose views on movies are at times very peculiar in the sense that he will like things that you don't expect him to, and won't like things that you normally expect him to.

He is a phrase maker, and I think that he will sacrifice an idea for felicity of a phrase.

Q. You have never lived in Cleveland?

A. No.

Q. Nor in Cuyahoga County, have you?

A. No.

Mr. Kleinman: I don't think that we have any further questions.

Judge McDermott: All right, Mr. Prosecutor. Anything else?

[fol. 546] Redirect examination of Henry Hart.

By Mr. Stuplinski:

Q. You indicated on direct examination that you knew W. Ward Marsh of the Cleveland Plain Dealer, Mr. Hart?

A. Yes.

Q. He is a motion picture critic?

A. Yes.

Q. Mr. Kleinman has asked you if you agree with certain New York and San Francisco writers about certain articles written by them, and I will ask you if you agree with this statement of Ward Marsh.

Mr. Kleinman: Objection, if the Court please.

This is cross-examination by the direct examiner, and I don't think that he has a right to ask his opinion about somebody else's article, your Honor.

Judge McDermott: Just a moment now.

(Conference held at this time among the three judge panel.)

Judge McDermott: Sustain the objection.

[fol. 547] By Mr. Stuplinski:

Q. Now,—

Mr. Stuplinski: John, will you mark these photostatic copies of the Cleveland Press, November 11, 1959, State's Exhibit 12, and 12-A for page 56?

(Marked accordingly.)

Q. Mr. Hart, I am now reading from what has been marked for identification as State's Exhibit 12-A, which is page 56, of an article appearing in the Cleveland Press, Wednesday, November 11, '59, to an article specifically written by a Mr. Paul Mooney entitled Stage and Screen. Will you tell me whether or not you agree with this statement of Mr. Mooney?

Mr. Kleinman: Objection.

Judge McDermott: Let him finish.

Mr. Kleinman: If the Court please, they asked the question, does he agree with this opinion.

Q. "At any rate, it makes the second-rate French offering controversial and—"

Mr. Kleinman: I object to this reading.

[fol. 548] Judge McDermott: The Court will not be influenced, and there isn't any jury here, gentlemen.

Mr. Kleinman: Withdraw the objection.

Judge McDermott: All right.

Q. Referring to the candid camera work, it says:

"At any rate, it makes the second-rate French offering 'controversial' and, moreover, wholly objectionable as far as common decency is concerned."

Do you agree with that statement, Mr. Hart?

Mr. Kleinman: Objection.

Judge McDermott: Wait a minute, and we will confer now.

(Conference held at this time among the three judge panel.)

The Witness: Will you read that again, please? Is he talking about the camera work?

Judge McDermott: Objection is sustained.

Q. I will ask you whether or not you agree with this statement made by—strike that, Mr. Sato.

[fol. 549] Q. Are you acquainted with the Hollywood Reporter?

A. Yes.

Q. Are you acquainted with a critic by the name of Jack Moffitt?

A. No.

Q. He wrote his review in the November 2, '59, issue of the Hollywood Reporter.

Mr. Terrell: If the Court please, he said that he doesn't know Moffitt.

Judge McDermott: Let him finish, and Mr. Hart will refrain from answering until the Court advises him to do so.

Q. Do you agree with this statement written by Jack Moffitt:

"Director Maile, with his shadowy shots of the heroine's bare and bucking torso seems to have his mind more on a fast franc (and a trans-Atlantic fast dollar) than on any profound comment on human nature.

"If this is a work of art, the old barroom ballad, 'Lil Taught School When She First Came West' should rank with Milton, and the old song, 'But Last Night On The Back Porch I Loved Her Best of All,' should be classified with Mozart."

[fol. 550] Q. Do you agree with that statement?

Mr. Kleinman: Objection to that.

(Conference of the three judge panel held at this time.)

Judge McDermott: Sustained for the same reason as given before.

Q. Are you acquainted with Newsweek magazine, Mr. Hart?

A. Yes.

Q. Reading from an article that appears in Newsweek magazine, September 21, '59, which has been marked as State's Exhibit 2 and State's Exhibit 2-A, an article about The Lovers, I will ask you if you agree with this statement:

"It is a completely amoral tale, and it contains one of the longest and most sensuous love scenes to be seen in this country since Hector was a juvenile delinquent."

Judge McDermott: Any objection to that, gentlemen?

Mr. Kleinman: No objection to that, your Honor.

Judge McDermott: All right, Mr. Prosecutor, proceed.

[fol. 551] Q. Do you agree with that statement?

A. I don't think that the word "sensuous" is the right one.

There is a benign connotation to that word which I don't think should be used in connection with this picture, or scene, that you are describing.

Q. What word would you use, sir?

A. I think perverted is the right word.

Q. Are you familiar, Mr. Hart, with the magazine called "New Republic"?

A. Yes.

Q. Reading from the December 7, '59, issue of the New Republic, which is marked as State's Exhibit 4, and page 21 of that magazine which has been marked for purposes of identification as State's Exhibit 4-A, I will ask you whether or not you agree with this comment:

"We are asked to believe—and to sympathize with—the thesis that one satisfactory sexual encounter, presumably her first such, is enough to make the wife spurn her whole past as a wasteful sham and go off with the young man who has brought her the Truth so pleasantly and so quickly.

[fol. 552] "The wisdom of the film is thus somewhat less than profound and indeed is somewhat dated. It belongs to the 'I tell you, Sex is Beautiful' school of the early part of the century: at the latest, to its thirties' manifestation, when it was believed that to master Van de Velde was to master life. One shudders for the future of the pair, particularly the woman. But the firm's unrestrained romantic plunge into the Reality of Sex is at least purely youthful. We cannot help being touched by its naivete, but we can certainly hear a fervant, wholesouled note."

Q. Do you agree with that statement, Mr. Hart?

Mr. Kleinman: Objection.

Judge McDermott: Just a moment now, gentlemen.

(Conference held of the three judge panel at this time.)

Judge McDermott: Sustained.

[fol. 553] Q. Mr. Hart, are you familiar with the magazine, "The Nation"?

A. Yes.

Q. Referring to the magazine, "The Nation," dated November 28, '59, marked for purposes of identification as State's Exhibit 3, and more particularly the page 407 of that magazine which has marked for purposes of identification as State's Exhibit 3-A, can you tell me whether or not you agree with this statement by Robert Hatch:

"Reduced to projections of a sexual revery, the principals of The Lovers are remote, stiff and objectively uninteresting. They too seem childlike, because men and women are never that free of their own pasts. To be more specific, when a woman walks out on a husband and child because a new acquaintance has roused and sated her she pays some price for the change of alliance. If she pays no price, she is a moral idiot and unrewarding as a character of fiction."

Q. Do you agree with that statement, Mr. Hart?

[fol. 554] Mr. Kleinman: Objection.

Judge McDermott: Just a moment, gentlemen.

(Conference held of the three judge panel.)

Judge McDermott: Sustained.

Mr. Stuplinski: I think that is all I have, and I have no other questions.

Judge McDermott: Gentlemen, any recross?

[fol. 555] Recross examination of Henry Hart.

By Mr. Kleinman:

Q. Mr. Hart, you were asked with reference to the review in Newsweek magazine, whether you agreed with certain language of the review.

May I read you the balance of this review, and ask you if you agree with this:

"Yet it has won high praise in France and a prize at the Venice Film Festival. Its young director, Louis Malle, who also wrote it, describes it as 'very moral. It is the story of a woman who is led out of a spiritual desert by love.' There is nothing dark or seamy-sided in the treatment of her adultery; the sun shines bright, the moon glimmers pure; the whole thing is almost matter of fact."

Q. Do you agree with this?

A. Well, I think I do, but I really don't know what he is saying.

Mr. Kleinman: Will you mark this Newsweek magazine, [fol. 556] dated September 11, '59, as Defendant's Exhibit G, and mark page 125 as Defendant's Exhibit G-a.

(Marked accordingly.)

Q. What is the National Board of Review?

A. A non-profit public organization devoted to, should I say, the best interests of the motion picture, and referring the public toward good movies.

Q. Who belongs to this National Board of Review?

A. We have about 175 public spirited men and women who serve without any recompense.

Q. Does it do any lobbying of any kind?

A. No.

Q. Is it opposed to censorship?

A. It is opposed to official censoring, and that is censorship by a government body before a picture is shown.

Q. You are aware, are you not, that this film is shown in a great number of cities throughout the United States at the present time?

A. Yes.

Q. And you know, of course, that it passed the Bureau of Customs as not being obscene?

A. I did not, but I assume that it did since it is here.

[fol. 557] Mr. Kleinman: That is all I have.

Mr. Osborne: Just a minute, Mr. Hart.

Judge McDermott: Anything else, gentlemen?

Mr. Stuplinski: Yes.

Judge McDermott: Proceed, Mr. Prosecutor.

[fol. 558]

Further redirect examination of Henry Hart.

By Mr. Stuplinski:

Q. Mr. Hart, Mr. Kleinman asked you some questions.

Judge McMahon: Can't hear you, Mr. Prosecutor.

Q. Mr. Kleinman asked you several questions about censorship and about the views of the National Board of Review?

A. Yes.

Q. Is there motion picture censorship in the State of New York?

A. Yes.

Q. Do you know whether or not the New York State Board of Censorship passed on the movie entitled, The Lovers?

Mr. Kleinman: Objection.

By Judge McDermott:

Q. Do you know? Yes or no?

Objection is overruled.

A. I assume that they did since it was shown in New York, but I don't know that they did.

Mr. Kleinman: Withdraw the objection.

[fol. 559] Judge McDermott: He said that he assumed, but he wasn't sure, and let that answer stand.

By Mr. Stuplinski:

Q. Isn't it a fact, Mr. Hart, that the movie was shown only when certain eliminations were made by the Board of Censorship in New York State?

Mr. Kleinman: Objection, and he said that he did not see that.

Judge McDermott: Read the question back, Mr. Sato.

(Question read back.)

Judge McDermott: If you know, you may answer, Mr. Hart.

The Witness: I don't know.

Q. What was your answer, sir?

A. I don't know.

Q. Do you know, Mr. Hart, whether or not this movie was allowed to be shown in the State of Maryland?

Mr. Kleinman: Objection.

A. I don't know.

Q. Do you know whether or not this movie was permitted to be shown in the State of Virginia?

Mr. Kleinman: Objection.

A. No.

[fol. 560] Q. Do you know, Mr. Hart, whether or not this movie was permitted to be shown in the city of Chicago, Illinois?

Mr. Kleinman: Objection.

Judge McDermott: If you know, Mr. Hart.

A. I read something that led me to believe that it wasn't.

Mr. Terrell: That would be hearsay.

Judge McDermott: Strike out the answer and disregard that.

Mr. Stuplinski: That is all, Mr. Hart.

Judge McDermott: The Court wants to thank you very much on behalf of all three of us.

Gentlemen, it is the desire of the Court to adjourn at 11:45 and resume again at 1:45 as all three of us have business connected with the court work.

(Recess held at this time.)

[fol. 561] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 563] May 27, 1960

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called as a witness DR. WILFRID GILL, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Wilfrid Gill.

By Mr. Osborne:

Q. You are Wilfrid M. Gill?
A. That is correct.
Q. W-i-l-f-r-i-d?
A. Yes.
Q. G-i-l-l?
A. Yes.
Q. What is your home address?
A. 352 Morewood Parkway.

Mr. Terrell: Speak up a trifle, doctor.
The Witness: Yes.

By Mr. Terrell:

Q. Address, again?
A. 352 Morewood Parkway.

By Mr. Osborne:

[fol. 564] Q. And your business or profession?
A. Physician.
Q. Where did you receive your medical education, Dr. Gill?
A. Marquette University.
Q. And when did you receive your degree of doctor of medicine?
A. 1934.
Q. Have you specialized in any particular branch of medicine?
A. Psychiatry and neurology.
Q. And where did you take your studies in psychiatry and neurology?

A. Spent two years in a private sanatorium in Milwaukee, Wisconsin; a year at Cleveland City Hospital; and I was assistant physician for one year at the Cleveland State Hospital; and assistant superintendent for one year at the Cleveland State Hospital; and spent three and one-half years at the Ohio State Reformatory examining prisoners.

I took post graduate studies in 1946 at Columbia University in New York.

I have been engaged in the practice of neurology and psychiatry all during this time, since 1934.

Q. Do you hold any official position with Cuyahoga [fol. 565] County?

A. Yes; 1941, appointed psychiatrist to the criminal branch of this court.

Q. You have been connected with that criminal branch since that time?

A. Since that time, yes.

Q. What are your duties with the psychiatric clinic of this court?

A. We conduct psychiatric examinations on the order of the Court on prisoners here referred to us.

Q. Will you mind telling us, doctor, how long you have lived in Cuyahoga County and worked in Cuyahoga County?

A. I have lived here most of my life, and all my practice has been in this area.

Q. And would you tell us of the activities you have with reference to clubs, organizations, or groups outside of your practice in the field of neurology and psychiatry, and your connection with this criminal court's psychiatric clinic?

A. Professional societies?

Q. Yes, start with that one.

A. Member of the American Medical Association, Cleveland Academy of Medicine, American Psychiatric Association, Central Neuro Psychiatric Association, Cleveland So-[fol. 566] ciety of Neurology and Psychiatry, and I am on the active staff of St. Vincent Charity Hospital, and St. John's Hospital.

Q. Do you have any connection with any adult associations or organizations?

A. I teach nurses psychiatry at St. John's College.

Q. Is that in Cleveland?

A. Yes.

Q. You belong to organizations other than professional organizations and educational institutes, Dr. Gill?

A. Yes.

Q. Will you name those?

A. Member of the Cleveland Crime Clinic. I am an inactive member of the Knights of Columbus, and that is about it.

Q. Now, doctor, in your every day life as a professional man in the field of neurology and psychiatry, and in your work with the psychiatric clinic of this criminal court, and your educational endeavors with the colleges that you have mentioned, and your connection with the organizations that you have mentioned, do you come in contact with great numbers of people from all parts of Cuyahoga County?

A. Well, I wouldn't say great numbers, but I conduct a [fol. 567] private practice, of course, and I would say I am a fairly busy practitioner.

Q. You are dealing with people most of your time while you are awake?

A. I would say so, yes.

Q. All right.

Now, doctor, would you say that you are acquainted with the every day standards of the people in this community with reference to the public discussion or public display of matters pertaining to sex?

Mr. Terrell: Objection.

(Conference held of the three judge panel.)

Judge McDermott: Overruled.

Mr. Terrell: Exception.

Judge McDermott: You may have your exception.

Q. Are you?

A. I would say, I think I am.

Q. All right.

Now, have you seen a motion picture entitled, Les Amants, or "The Lovers"?

A. Yes, I did.

Q. Can you tell us, doctor, what is the dominant theme of that film?

[fol. 568] Mr. Terrell: Objection.

Judge McDermott: Overrule the objection.

Q. Will you answer, doctor?

A. Well, the dominant theme is adulterous relationship with a—on the part of a married woman with a young man, and the whole picture, I would say, is directed toward the sexual expression.

Q. Now, doctor, I want you to have in mind your testimony as to the dominant theme.

I want you to have in mind your knowledge of the every day contemporary community standards of the people in this community with reference to the public expression or discussion, or portrayal of matters involving sex, and I will ask you this question:

You have an opinion, doctor, as to whether or not, taking into consideration the contemporary community standards of the dominant theme as you have mentioned it, does this film deal with sex in such a manner as to arouse lustful thoughts and desires in the average person?

Mr. Terrell: I object, and I will say if you reread the question there is no question telling this man to tell us what he saw, and this entire question is leading right from [fol. 569] the beginning, directing his point to certain items in this film, and he is on direct examination, and that is not the proper question, your Honor.

Judge McDermott: Just a moment; gentlemen.

(Conference of the three judge panel held at this time.)

Judge McDermott: The Court thought that the form of the question is improper.

Mr. Osborne: May I restate that?

Judge McDermott: Yes.

Q. Do you have an opinion, doctor, as to whether or not this film deals with sex in such a manner as to arouse lustful thoughts and desires in the average person in view of the contemporary community standards?

Mr. Terrell: I object, and the proper question would be, what is your opinion of the picture, and not to direct him to a so-called answer, and this is direct examination, your Honor.

(Conference held at this time of the three judges.)

Judge McDermott: Overrule the objection, and limit the [fol. 570] doctor to a yes or no answer.

Q. Do you have an opinion, doctor?
A. Yes.
Q. What is that opinion?
A. That this film does arouse lustful thoughts and desires in the mind of the viewer.

Mr. Terrell: I did not get the end of that.
The Witness: In the mind of the viewer.
Mr. Kleinman: In the mind of the viewer?
The Witness: That is correct.

Q. And in your answer are you taking into consideration the average person and the contemporary community standards?

Mr. Terrell: Objection to leading the witness.
Judge McDermott: Sustain the objection.
Mr. Osborne: I will withdraw that.

Q. Doctor, upon what do you predicate your opinion [fol. 571] of the film that you have just expressed?
A. One particular scene which occurred in the bedroom where obviously the two people are engaging in sexual relationship.
Q. Is there anything further that you wish to add at this time?
A. No.
Q. Doctor, can you define for us the term, cunnilingus?

Mr. Kleinman: Objection, if the Court please.

(Conference among the panel of three judges.)

Judge McDermott: Doctor may answer, and overruled, but in view of his professional capacity.

A. This is a term used to discuss stimulation of the genitalia of a woman by the application of the mouth, or tongue, by another individual to that particular area.
Q. Now, doctor, you have testified that in the bedroom scene, that there were two persons obviously engaged in sexual relationship.

Mr. Terrell: If the Court please, object to this line of [fol. 572] questioning of repeating what the witness has said to direct his mind toward the answer that he wants.

Judge McDermott: The doctor said what they were doing in the bedroom, and the bedroom scene.

Mr. Terrell: We have no objection to that, but the way he has repeated that.

Q. Would you tell us, doctor, in connection with your answer two or three questions ago, will you give us in detail what you observed in the bedroom scene?

Mr. Terrell: Object to that.

Judge McDermott: Overruled, and he has talked about that, and let him tell us further.

Q. Will you answer, doctor?

A. Yes.

The two parties involved entered the bedroom and engaged in undressing each other, and went to bed, and the woman is exposed to an area somewhere below the breasts, and the man is not visible at this point, and yet the woman obviously is experiencing some sort of sexual stimulation and gratification, which in my opinion represents experiencing an orgasm.

Q. Doctor, can you tell us what is meant by the expres- [fol. 573] sion, prurient interest?

A. Prurient actually means itching. However, in the broader sense it is defined as incitement of sexual feelings, and stimulation of the genital area.

Webster further defined it as lewd.

Q. I see.

Mr. Osborne: You may inquire.

[fol. 574] Cross examination of Dr. Wilfrid Gill.

By Mr. Terrell:

Q. Doctor, can you describe in a little more detail the exact reaction you had after seeing this bedroom scene with reference to prurient feelings?

Mr. Osborne: Objection, and I wish to be heard.

Judge McDermott: Overruled.

Mr. Terrell: He is a doctor, and I am going into the reaction that the doctor would know about.

Mr. Osborne: Your Honor, the test is not the effect upon the witness but upon the average person.

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time among the three judge panel.)

Judge McDermott: Court feels that Dr. Gill is an average person and an expert, and these are rough questions, but in view of what you asked from him and the Smith case, too, he can be required to answer.

[fol. 575] Mr. Terrell: Thank you, your Honor.

Judge McDermott: You may have an exception.

A. I would say that—

Q. You, doctor.

A. I am talking about myself.

Q. Go ahead.

A. Certain prurient feelings, or desires, certainly were aroused in me as I felt could be aroused in any male viewing this scene.

Q. That is your conclusion.

Now, give me the elements that go to make up the prurient feelings, and did you have an itching and some sort of physical manifestation, and did you foam at the mouth?

Mr. Osborne: Objection.

Judge McDermott: Sustain the objection, and let the doctor tell us his own reaction in his own words.

Mr. Terrell: I want an answer as to what he—

Mr. Osborne: It isn't what you want, but what is proper.

Mr. Terrell: Let me finish.

[fol. 576] Judge McDermott: The doctor has answered, and we have had an answer, and that is in the record.

Mr. Osborne: I will ask that the answer be read then.

Mr. Terrell: Thank you, your Honor.

(Answer read back at this time.)

Q. I will ask this question:

Please give me the elements that lead up to your conclusive answer that it aroused your prurient interests?

Mr. Osborne: Objection.

Judge McDermott: The doctor may answer that, and about the elements of pruriency, and on that basis the doctor may answer, giving the elements set up in that definition.

A. Well, I would say that the element of voyeurism on viewing such action on the part of other individuals is bound to have a certain amount of fantasy on the part of the viewer, or desire on the part of the individual to be part of this particular scene.

Q. Isn't that true of any scene that we see in the movies, that we transform ourselves and try to become part of the scene, and the message which is conveyed to the viewer?

[fol. 577] A. Yes, I think it is.

Q. So that there is nothing unusual about that in this particular picture, other than the theme of adultery; isn't that right, Dr. Gill?

A. Well, adultery plus sexual relations.

Q. When you say sexual relations, you had to imagine that, and you did not actually see that, doctor?

A. Yes.

Mr. Osborne: Let him answer the question.

Mr. Terrell: I wish that you would continue your answer.

A. As I say, the actual act of sex penetration or cunnilingus wasn't visible.

Q. That is correct, so that it must be in the eyes of the viewer; must it not?

A. That would lead to the assumption, or to the conclusion, that there was actual sexual activity going on because of the reaction of the woman.

Q. And, in other words, the mere fact that she was acting and going through some sort of feeling, and the scene that you saw in the bedroom, that led you to believe that intercourse was taking place. Is that right, doctor?

[fol. 578] A. Yes.

Q. And it didn't lead you to believe that cunnilingus was taking place?

A. Yes.

Q. But you did not see his head, and you did not see her genitalia?

A. No.

Q. So that you must imagine that, and that is what is in your eyes?

Mr. Osborne: I object to imagine and what is in a person's eyes.

Judge McDermott: Ask him about imagine.

Q. Isn't that right, doctor?

A. Yes. You cannot see that, and you have to assume that it is taking place.

Q. And all of this is assumption; isn't it?

A. Yes.

Q. In other words, if we took the picture and took each individual square of the picture as it is shown, and eliminate our imagination, we could come to no conclusion that anything vile was taking place; is that right?

A. If you took each individual scene?

[fol. 579] Q. Each individual square of the picture as it went along, because this is made up of a series of different pictures?

A. Yes.

Q. You have been a psychiatrist for many years; have you not, doctor?

A. Yes.

Q. And the people that you have dealt with in most of your psychiatry have been abnormal people; isn't that correct?

A. All right; abnormal.

Q. All right.

Now, doctor, Mr. Osborne was talking about the average man.

Can you tell these Honors and tell myself what constitutes the average man, that is, his backgrounnd and his I. Q., and intelligence, and state of origin, and how you arrive at that, please?

A. That is a very broad definition, and normal means average, or average means normal, and talking about an individual who has, we assume, average intelligence, who has been properly brought up in this environment, and adapted himself to the customs of the society in which he lives; and he abides by certain ethical standards and rules [fol. 580] of the community, and who has usually fairly good emotional control.

Q. Now, this would be pretty much a definition for both male and female?

A. Yes.

Q. And our community is constituted here of about fifty-fifty, half men and half women?

A. I think so.

Q. And the description that you have made, as far as pruriency, was made in viewing the picture and was pretty much the reaction of a male, rather than of a female; isn't that right?

Mr. Osborne: I will object to that because he did not make any distinction in his answer that just males were involved in this definition of pruriency, because it would affect females, and they are the subject—they are subject to prurient desires, same as males.

Q. But, in viewing this so-called bedroom scene that you said would have an effect upon you, dealing with the average female of average intelligence, who would follow within normal confines and not be overly intelligent or be a moron, would a woman have the same reaction that you described before?

A. Yes.

[fol. 581] Q. You think that it would have an effect of prurient interest also?

A. Yes.

Q. You saw the entire picture?

A. Yes.

Q. Did you see anything wrong with the map where the credits were thrown against as a background?

A. This was a symbolic map, and not a map of an area, nor was it a map of anything that I know about in France, and—

Q. If I tell you—

Mr. Osborne: Just a minute. I don't believe that the doctor had completed his answer.

Mr. Terrell: You ask him if he has finished.

Judge McDermott: Doctor, are you through?

The Witness: Yes.

Judge McDermott: Now, gentlemen, let us get along, and you have been behaving yourselves for five days.

Q. If I tell you that the map is hanging just the way that it is in one of the museums of Europe, would you still have the same opinion?

[fol. 582] A. Yes.

Q. Do you think that it is a dirty map?

A. I would not say that it is dirty, but only symbolic, and thrown on in such a quick way that I don't think the average individual would think too much about it.

Q. Taking the map itself and forgetting the rest of the picture, that would not affect your prurient interest nor mine, nor any normal person's?

A. No.

Judge McDermott: How long will you be?

Mr. Terrell: Some time.

Judge McDermott: Doctor, will you be available at 1:45 P.M.? All of us have court work of another nature, and we will adjourn until 1:45 this afternoon, and the doctor will be available then, so that we can conclude.

Dr. Gill: Yes.

(Luncheon for all participants at this time, so the noon recess was taken.)

[fol. 583] Friday, May 27, 1960, at 1:30 P.M.

Cross examination of Dr. Wilfrid Gill. (Continued)

By Mr. Terrell:

Q. Doctor, when you saw the picture, or, before that, when did you see this picture?

A. Last Friday evening, about 6:00 o'clock.

Q. And where did you see that?

A. Twentieth Century-Fox Building over on Payne Avenue.

Q. And who was present in the audience?

A. Another gentleman, a psychologist, and his name I don't recall, and myself.

Q. This was a private showing for you two gentlemen by the County Prosecutor's office?

A. Yes.

Q. And that was—did you have any discussion with these gentlemen about the picture?

A. None.

Q. What time was the picture over, doctor?

A. About 8:00 o'clock, or a little after.

Q. After you saw this picture, did that cause you to do anything as a result of this picture, or did you just go [fol. 584] home?

Mr. Osborne: Objection.

(Conference among the three judge panel.)

Judge McDermott: Overrule the objection.

A. No. I went home.

Q. It did not cause you to participate in any antisocial conduct?

A. No.

Q. Isn't that correct?

A. That is correct.

Q. And the normal person in the community viewing this picture would react the same way that you did; isn't that right?

Mr. Osborne: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection in view of the fact that he is an expert and qualified, and he is here.

A. That reaction, I think, would depend upon many other factors.

Q. I am talking about the average person with normal sex instincts, because that is the test that we have here. [fol. 585] After this picture was seen by a normal average individual with normal sex instincts, would they do anything other than what you did, pick up and go home?

A. They might and depends upon other circumstances, too.

Q. What other circumstances?

A. If they are younger people, and, say, if under the influence of liquor, or partially under the influence of liquor; and if there had been some discussion between a man and his date, after such picture I could well visualize that other things could happen.

Q. You are now broadening the scope of the average person in the community; and, if my memory serves me correctly, you stated that the average person would conform to the mores and folkways of the community, and—

Mr. Osborne: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: Sustained, and the way that you put that question.

Q. Doctor, if a normal average person acting under normal average situation, not drunk or anything else that would interfere with their mental or their physical well [fol. 586] being, they would have the same reaction that you had after seeing this picture?

A. Not necessarily.

Leaving out—because leaving out liquor, I could see where younger people would be more greatly influenced than I was at that time without the influence of liquor.

Q. Younger people then.

When you say younger people, the normal person, and that is the average person with normal sex instincts, isn't

one person but is a group of people, whether they be young, middle age, or old, falling in certain categories.

Isn't that correct, doctor?

A. Yes.

Q. And it would be difficult for you to say that everybody in the age group of 55 to 60, who would be normal with normal sex instincts, would go home; isn't that right?

Mr. Osborne: Objection.

Mr. Terrell: I mean, eliminating liquor.

(Conference among the three judge panel.)

Judge McDermott: You may answer in your own way [fol. 587] from that question.

A. That the average person in that age group would go home?

Q. That it would have absolutely no effect whatsoever?

A. That is again very difficult to state because I still insist that there can be other situations or circumstances at the time, or even after viewing such a thing, that would change their reaction, whether they are 50 or 55.

Q. They would have to have available some place where they would go ahead and participate in the sex act?

A. That would be one.

Q. In other words, if this picture were shown in somebody's bedroom, there might be an entirely different reaction than if shown in a public movie house where there are no beds provided; isn't that right?

A. Yes.

Q. Now, doctor, let me ask this:

Is there anything different, or is there any difference between sex stimulation and pruriency?

A. Yes.

Q. Can you tell us what the difference is between sex stimulation and lewdness, or pruriency, and I guess you [fol. 588] can use pruriency and lewdness synonymously?

A. Well, there would be normal sexual stimulation between a man and wife, and that certainly would not be vulgar or lewd, or presented in such a way to the individual as to make it unacceptable, whereas my impression of

lewdness or pruriency would be where it would be presented in such a light that there would be a definite play on the sex instincts, or an effort made to stimulate that by certain picture's actions, and so forth.

Q. In other words, doctor, wouldn't this be a fair statement, that what would sexually stimulate a husband and wife would be considered perfectly all right, but if the same stimuli were applied to a man and woman that are not married, then you would call that lewd or prurient?

A. Not entirely, because some things while they are not in this particular situation could be so vulgar or lewd, whether they are correct or not, would in my opinion be considered prude or lewd.

Q. Can you name to this Court what some items of sexual stimulation might be that would not affect pruriency?

A. I think love making between a man and woman who are married and in love with each other.

[fol. 589] Q. All right.

A. That, I think, would be the most evident situation.

Q. All right.

Now, if we take the same situation, and we take the people making love to one another, and they are not married, that would be prurient; isn't that right, doctor?

A. It would be immoral.

Whether you would call that prurient or not, I don't know.

Q. Well, would you call that obscene?

A. Not necessarily.

Q. In other words, if people engaged in adulterous acts, that would be immoral; would it not?

A. Yes.

Q. And it also tends to lead toward lustful thoughts, would it not?

A. Yes, it would.

Q. All right.

And in that particular series of thoughts, wouldn't that lead you to the conclusion that if a man and woman participate in an adulterous relationship that would affect pruriency?

A. Yes.

Q. All right.

[fol. 590] Q. Now, doctor, let me ask you this:

Would perfume appeal to the social or sexual desires? Would that stimulate people sexually?

A. Yes, I think it does.

Q. And the use of perfume is not prurient, is it?

A. No.

Q. Doctor, would dancing—I mean where the man and the woman dance to the various tempos that they dance to today, would that have a tendency to incite people sexually?

A. I doubt that dancing would, at least dancing that I know.

Q. Well, Latin-American dances that are so prevalent, Mambo, Fox Trot, and the Jitterbug that is commonly danced in Cleveland, where the parties are close to one another, and they go through the various gyrations?

A. I don't think so.

Q. You don't think that would stimulate sexual desire?

A. No.

Q. Do you think every—

Judge McDermott: Doctor, did you have an answer to [fol. 591] that last question?

The Witness: No, sir; I don't believe they would.

Q. Well, doctor, do you believe that viewing advertisements in the newspaper which advertise Bikini bathing suits on women, or brassieres, or girdles, or panties, would those particular items be sexually stimulating to the average person with normal sex instincts?

A. No. Not in the advertising that I have seen. Talking about sales advertising?

Q. Yes.

A. I would say no.

Q. Now, is there anything else? You have only mentioned one thing, if my memory serves me correctly, that you say is sexually stimulating, and sexually stimulating and pruriency are different only when a husband and wife make love?

A. What is that?

Mr. Osborne: I will object to that. He did not say that.

Judge McDermott: He did not say that.

The Witness: I did not say that.

I used that example because you asked about the differ-
[fol. 592] ence between lewdness and normal stimulation.

Q. Can you describe any other situations where people would be sexually stimulated, doctor, and still not affect the prurient interest of the average person with normal sex instincts?

A. Without being prurient or lewd; is that your question?

Q. Yes, doctor.

In other words, I want you to give us an example of something that would be lewd.

A. I think certain modes of dress, and the normal viewing of an attractive female on the part of a male would naturally create sexual stimulation without being prurient or lewd.

Smell of perfume might, depending again, I think, upon certain circumstances.

Q. Thank you. Go ahead.

A. Perhaps certain types of display dancing, such as done by entertainers, but not ballroom dancing. Even certain remarks or alleged jokes. I think all those things could under certain circumstances arouse sex interest.

Q. Well, let us get back to The Lovers for a moment.

[fol. 593] Q. If this picture, portraying the bedroom scene, which was the scene that you find objectionable, and that bedroom scene were participated in between a husband and a wife, rather than the archeologist and the wife, would your opinion as to the appeal to the prurient interests be different?

A. It would be the same.

Q. Even though it would husband and wife, doctor?

A. That is correct.

Q. If that were—if that scene were cut out of the picture completely, would you have any comment to make as to whether that picture would appeal to your prurient interests?

A. No. It would be boring.

Q. It would be boring?

A. Yes.

Q. But it would still have a theme of dealing with relationship of various people toward one another?

A. Yes.

Q. So if we snip that portion out, the picture would not be obscene in your mind?

A. Yes.

Q. Doctor, you have been a resident of Cleveland for a [fol. 594] long period of time?

A. Yes.

Q. And you are acquainted with some of the items which are sold on the news stands; isn't that correct, doctor?

A. Yes.

Q. Are you personally—do you have knowledge of the fact that Lady Chatterley's Lover is sold on the news stands in the City of Cleveland?

A. Yes.

Q. Have you had occasion to read this book, doctor?

A. No.

Q. You do not know what the contents are other than what you have heard or read concerning same, doctor?

A. That is correct.

Q. You don't know anything about the passionate situation that exists between the wife and the gardener, doctor?

A. No, I do not.

Q. If I were to tell you that this story dealt with adultery and that there were love scenes that were described down to the words which leave nothing to the imagination, would you have an opinion about where or not that book [fol. 595] were obscene?

Mr. Osborne: Objection, and I wish to be heard.

(Conference of the panel of three judges held.)

Judge McDermott: Overrule the objection.

Q. You may answer.

A. In my opinion—my opinion is that the book would be obscene.

Q. All right, doctor.

Doctor, have you ever attended burlesque in Cleveland?

A. Never.

Q. Do you know that burlesque exists?

A. Yes.

Q. Do you have an idea or opinion about what goes on in a burlesque theater?

A. Frankly, no.

Q. Do you have any opinion as to whether or not the community has accepted and permitted burlesque to run in our city here for more than twenty-five years, doctor?

Mr. Osborne: Objection.

(Conference held of the panel of three judges.)

[fol. 596] Judge McDermott: Overrule the objection.

A. Yes, I know that.

Q. Sure, we know that. That is very simple.

Are you well acquainted with the fact, doctor, that there are various types of entertainment which exist in the downtown areas, particularly on Short Vincent, and along Chester Avenue and Ninth Street, clear to the Roxy Burlesque Theater?

Mr. Osborne: That doesn't run into Ninth Street.

Mr. Terrell: You haven't been downtown lately, Tom.

Judge McDermott: He lives over on the West side of town.

Q. That time entertainment has been with us in the City of Cleveland ever since prohibition has been repealed?

A. For a long time.

Q. And the community has accepted that type of entertainment, have they not?

Mr. Osborne: Objection to that, your Honors.

Judge McDermott: He can tell us.

[fol. 597] A. I don't know if they have accepted that, but they tolerate that.

Q. In your opinion, that type entertainment is obscene, is it not, doctor?

Mr. Osborne: Objection to that now.

A. I have never been in one of these.

(Conference of the three judge panel at this time.)

Mr. Terrell: Hold off, doctor.

Judge McDermott: He said that he was never there; but, if he can give an opinion, he may.

A. I have never been in one of these places, and from the pictures on the outside I would assume that they are so-called strip tease or semi strip tease, which to me are vulgar, and I have no interest in them whatsoever.

By Judge McDermott:

Q. That is all that you know?
A. Yes.

By Mr. Terrell:

Q. Those two forms of entertainment are principally designed to appeal to the prurient interest of people who patronize them; isn't that true?
[fol. 598] A. I would imagine so, but I don't know since I have never seen one.
Q. Doctor, have you ever seen Playboy magazine on the stands of the City of Cleveland, or in Cuyahoga County?
A. Yes.
Q. I am now referring to Defendant's Exhibit A, page 44, and take a look at that please, doctor?
A. Yes.
Q. That portrays a woman in the nude; does it not, doctor?
A. Yes.
Q. Is there any suggestive pose in that picture, doctor?
A. I would say the whole thing is suggestive.
Q. Wouldn't you say that the entire book is designed to appeal to the prurient interest of its purchasers?
A. Yes.
Q. This circulates in the City of Cleveland, does it not, doctor, I mean Playboy magazine?
A. I guess so, and I have seen that.
Q. Sure.
Doctor, I am now referring to Defendant's Exhibit B, which is Gent magazine, and I would like to refer you to [fol. 599] pages 34, 35, for the moment, these three pictures on pages 34, 35.
A. Yes.

Q. Would you say those pictures, doctor, were principally placed in that magazine for appeal to the prurient interest of the buyer?

A. Yes.

Q. And would you say that they are lewd and lustful; isn't that correct?

A. Yes, they are.

Q. Do you know whether or not this magazine circulates on the news stands, doctor?

A. No, I don't recall ever seeing that before.

Q. Do you know anything about Rogue magazine, which is Defendant's Exhibit C. Ever seen this magazine on the news stands here in Cleveland or in the County of Cuyahoga?

A. No.

Q. I will refer to the center piece of this magazine, and pages 41, 42, those pictures depicting a girl in a state of undress and this position; isn't that correct, doctor?

A. Yes.

Q. Would you say that the pictures are primarily in your opinion placed in that magazine to appeal to the pru-[fol. 600] rient interest of the purchaser?

A. Yes.

Q. And as such it is lewd, lascivious, and prurient?

A. Yes.

Q. Doctor, have you ever seen—

Judge McDermott: Is that Cavalier magazine?

Mr. Terrell: Yes.

Q. Have you ever seen Cavalier, Defendant's Exhibit D, have you ever seen this upon the news stands?

A. No.

Q. Let us refer to Defendant's Exhibit D and refer to pages 36, 37, 38, 39, and 40.

Those pictures of this girl, June Wilkinson, are very suggestive; are they not, doctor?

A. Yes.

Q. And principally placed in this magazine for the purpose of appealing to the prurient interest?

A. Yes.

Q. They are lewd and lascivious magazines—I mean pictures?

A. Yes.

Q. Doctor, have you ever seen Sir magazine on the news stands in the City of Cleveland?

[fol. 601] A. No, sir.

Q. Referring to Defendant's Exhibit D on the front page of the magazine, wouldn't you say that the picture of the young lady who is apparently naked is put there principally to appeal to the prurient interest of the person?

A. Yes.

Q. And that is a lewd and lascivious picture? Is it not, doctor?

A. I believe that it is.

Q. Now, there are other pictures in the magazine, but there is no sense in boring you with them, and you would have the same reaction I would fear, doctor, that you alluded to on the others?

A. Yes.

Q. The same type of prurient interest that you alluded to in viewing the Lovers; isn't that right, doctor?

A. Yes.

Q. May I ask you this:

Have you done any marriage counseling?

A. Yes.

Q. That is part of your job as court psychiatrist, doctor?

A. Mostly in my private work.

[fol. 602] Q. Private practice?

A. Yes.

Q. Doctor, isn't it one of the most serious problems that we have today in marriage counsel, or perhaps after they are married for some period of time, that they become bored with one another because of the inattention of one spouse toward another?

A. It is one of them.

Q. It is a problem that we realize each day; isn't that correct?

A. Yes.

Q. And I am sure that that problem has been presented to you?

A. Yes, it has.

Q. And you say that this picture, The Lovers, attempts to portray a situation of that type where the husband is

more concerned with his business and shows absolute inattention to his good looking wife who has been married for approximately eight years?

A. There is an illusion to it.

Q. But, as a matter of fact, she goes down to the newspaper plant?

A. Yes.

Q. For the purpose of attempting apparently to talk to him or try to create a feeling between the two; and, in [fol. 603] other words, show an interest in what he is doing or try to have him show an interest in her; isn't that right?

A. No.

Q. Do you get any social significance from the fact as she came into the newspaper plant the secretary came out of the room and said that I will find your husband for you? Recall that scene?

A. Yes.

Q. Is there any significance to that scene?

A. Yes.

Q. What is that significance?

A. In the first place, when the telephone call came through, if you remember, he terminated his conversation with the word, dear, and left the house, and said I have to go to the newspaper.

Q. Yes.

A. And the comments by the commentator were that she began to have some doubt, and she followed him to the newspaper, in my opinion to find out if he was having some affair with a girl or if he were really working.

Q. In other words, she showed some interest in the marriage at that time, or showed some interest in the activity [fol. 604] of her husband; isn't that right?

A. Yes.

Q. So that she went down to the newspaper plant to see if he was actually there?

A. Yes.

Q. And she did that to find out about whether or not he is having some sort of extracurricular activities or whether he had gone to the plant—but that would have to be in the mind of the viewer; isn't that right?

A. Yes.

Q. And, doctor, isn't it one of the things that is so prevalent today, that love and affection between two people can be of such strength and tremendous potential that they are willing to throw away everything that they have acquired in the past? Isn't there some theory or basis for that theory?

A. Well, it is a fact, and there are such situations.

Q. That is right, and doesn't this picture depict that type of situation, the tremendous impact and the tremendous power of love and affection?

A. No.

Q. Doctor, would you say that this picture doesn't show that a woman who has everything according to our stand-
[fol. 605] ards, a big home, and has a car, and has a nice child, and apparently is in the wealthy category, and has all of the material things that people strive for, and perfectly willing to throw that away because for the first time in her life she finds somebody who will give her some love and affection?

A. We don't know that. Actually, she was looking for love and affection from the polo player before she happened to meet this other fellow.

Q. That is correct, but she did not find the so-called love, and the picture did not portray love and affection from the polo player, other than some of the words that passed between them?

A. Yes.

Q. But here you see a woman who has everything that anybody would want, perfectly willing to push that out the window to go off with her lover and leave everything because she has finally found real love and affection.

Could you picture that in that particular picture, doctor?

A. She has found an interest in another man, and found another man sexually attractive, but I would not call that true love and affection. No.

Q. Well, let me ask you this:

[fol. 606] Sex can either be very beautiful between a husband and wife or it could be very dirty and cheap; isn't that true?

A. Yes.

Q. In your marriage counseling, doctor, when they come to you with a problem of this type where there is boredom and lack of interest, and where the husband refuses to show his wife any attention, what do you prescribe?

A. Natural thing is to show more attention and more personal attention and affection.

Q. Do you go into delving into whether or not they have satisfactory sexual relations with each other?

A. Sometimes.

Q. Isn't that one of the important functions of marriage in our social system?

A. I think that it is important.

Q. Doctor, it is very important!

Judge McDermott: He said that it was important.

Q. I don't want to belabor the point too much, but, nevertheless, other people, such as a newspaper critic, could very easily see that particular problem in this picture and say that this is the problem, and this is the way that [fol. 607] this problem was resolved by the director; isn't that so, doctor?

A. Problem is one of boredom and what the lack of affection or boredom makes, and this is the way that the director presents this.

Q. To meet this particular situation?

A. Yes.

Q. In other words, the director, or people who produced the picture, don't necessarily condemn or condone this type of activity, but in the picture they say that there is a problem, and this is one of the solutions that has happened in a case similar to this, and they present that for the public acceptance. Isn't that right, doctor?

A. You mean that is supposed to be the hidden message in it?

Q. I am asking you if critics have found that hidden message to be there?

A. I don't know, and I am not a critic.

Judge McDermott: He said that he is not a critic, and that answers itself.

Mr. Terrell: Very good. We will cease that line of interrogation, your Honor.

Q. Doctor, there is another few questions I wish to ask [fol. 608] you before I get through.

Have you traveled to many cities throughout the United States in your lifetime?

A. Not too many; no.

Q. Have you read books about conditions in other cities throughout the country?

A. Not books, but periodicals.

Q. Yes.

Can you with any degree of certainty tell us whether the average person with normal sex instincts in Cuyahoga County, Ohio, would be any different than the average person with normal sex instincts in Lucas County, Ohio, about 120 miles from here, principal city being Toledo?

A. No.

Q. You say that they have the same—

A. If they are normal.

Q. Normal person here would be the same average person there?

A. Yes.

Q. Would your answer be the same for Columbus, Ohio?

A. Yes, I think so.

Q. Would your answer be the same for Detroit, Michigan? [fol. 609] A. Yes.

Q. Would your answer be the same for New York City, New York?

A. Yes.

Q. You were well aware, doctor, that this picture has shown in some 40 to 50 cities throughout the country?

A. No; not until you just told me.

Q. I am sorry, and I thought that you might have heard this before.

Judge McDermott: How many?

Mr. Terrell: 40 to 50, your Honor.

Judge McDermott: It was only 30 the other day, but that is not evidence.

Mr. Terrell: We are getting higher because we are showing it in more cities, your Honor.

Q. Doctor, would it be a fair statement to say that if the community of New York City and the community of

Detroit, Michigan, and the community of Toledo, Ohio, and the Community of Columbus, Ohio, permitted the showing of this picture that this picture would not be a lewd and lascivious nature which would offend the contemporary community standards of the cities we have just spoken about?

[fol. 610] Mr. Osborne: Objection.

(Conference of the three panel court held at this time.)

Judge McMahon: May we have that question again, Mr. Sato?

Mr. Terrell: Would you read that back, please?

(Question read back at this time to all concerned.)

(Conference of the three judge panel held again.)

Judge McDermott: Sustain the objection.

Q. Do you have an opinion about whether community standards of New York City, Detroit, Michigan, Columbus, Ohio, and Toledo, Ohio, are the same as the community standards of Cleveland, Ohio?

Mr. Osborne: Objection to the repetition.

Judge McDermott: If you know, you can answer.

A. I would assume they are the same, but I don't know specifically.

Q. In other words, the United States that is comprised of most of the cosmopolitan areas is made up of hetero-
[fol. 611] geneous groups?

A. Yes.

Q. And we have in Cleveland similar people of heterogeneous groups such as there are in Detroit, Columbus, and Toledo?

A. Yes.

Q. And it would be your opinion that the community standards of these four cities would be the same as the community standards of Cleveland?

A. Yes.

Q. Doctor, there is one further question.

In dealing with sexual—well, I don't know how to phrase that— strike that.

Would the average person with normal sex instincts see sexual manifestations in ink blots?

A. No, not as a rule.

Are you talking about the Rorschach test?

Q. That is right.

A. He could see some, but they certainly—in fact, normal does see some, but they are certainly not outstanding.

Q. But that would have to come because the ink blot in and of itself wasn't made with any thought and design in mind?

A. No.

[fol. 612] Q. And for sexual connotations to be expressed it would have to be in the mind, seen through the mind of the interviewer; isn't that right?

A. Yes.

Q. And isn't that the way that it is with all reading material, motion pictures, and so on, whatever opinion we have is our individual opinion which comes from our own imagination, as to what is in our own mind.

Isn't that true, doctor?

A. I cannot accept that.

If we are viewing something or reading something, you are assuming by that question that we have a preconceived notion or judgment about what we are about to undertake to do, to read, or see, and I don't see that at all.

We read, or view, or acquaint ourselves with various media of approach to learn or be entertained at least.

Q. Well, in other words, we go to the motion picture, or theater, for the purpose of being entertained; isn't that right, doctor?

A. Yes.

Q. And you are acquainted with the fact that the bedroom scene—the bedroom scene in the eternal triangle, and [fol. 613] adultery and various other forms of sexual manifestation are vividly portrayed on the motion picture screen, and also portrayed in the legitimate theater; isn't that right, doctor?

A. Vividly.

Q. Vividly?

A. Sex expression, I can say that much, but I can't think of any scenes that I have witnessed either on the stage or

in the movies that would go beyond saying that certain sexual feelings or tendencies are portrayed.

Q. Are you a habitue of the Hanna Theater?

A. No.

Q. Did you see the Private Love of Suzy Wong?

A. No.

Q. Is there any other play that you have seen at the Hanna Theater dealing with the eternal triangle, doctor?

A. No.

Q. Any motion picture that you have seen lately that you would consider falls in the same category as The Lovers?

A. No.

Q. Any book that you have seen or read that would fall in the same category?

[fol. 614] A. No; not that I can recall.

Q. Doctor, have you seen the picture Lady Chatterley's Lover?

A. No.

Q. Have you seen the picture or read the book Anatomy of a Murder?

A. No.

Q. Have you seen the picture or read the book Suddenly Last Summer?

A. I don't recall that one.

Q. Have you seen the one From Here to Eternity?

A. No.

Q. Have you read Hawthorne's Scarlet Letter?

A. Yes.

Q. Dealt with adultery?

A. Yes.

Q. Back in 1850 in most cities in the United States it was banned?

A. I don't recall.

Q. You would not consider that book obscene, doctor?

A. No.

Q. But there are passages in there that deal with adultery and pretty vividly describe their going away with one another?

[fol. 615] Mr. Osborne: I will discuss that question, and he is taking liberties with the story now.

Q. Is that true despite the fact that Mr. Osborne has read that recently?

Judge McDermott: Can you say, doctor?

The Witness: I don't know about that.

Q. Doctor, did you read Dreiser's American Tragedy?

A. Many years ago, yes.

Q. You would not consider that book obscene, would you?

A. I don't remember too much about that to give an opinion right now.

Q. Well, there was immoral love, and, as a matter of fact, the relationship wasn't adultery, but the relationship between the boy and girl outside of marriage that caused her condition and eventually caused her death?

A. Yes.

Q. You wouldn't consider that book to be lewd and lascivious?

A. Again, I don't remember how it was presented, and I wouldn't offer an opinion.

[fol. 616] Q. Doctor, have you seen any motion pictures lately?

A. One.

Q. Which one?

A. Ben Hur.

Q. Anything lewd and lascivious about Ben Hur?

A. I saw nothing in it.

Q. Can you recall any other picture, doctor?

A. No.

Q. Look Back in Anger?

A. No. That is the only motion picture that I have seen in a long time.

Q. Just one last question.

And the same pruriency that was aroused in seeing The Lovers would be aroused in you in seeing a burlesque show, the B girls, or looking at these magazines that I show you that are represented by Defendant's Exhibits A to E inclusive. Isn't that right?

Mr. Osborne: Objection.

Judge McDermott: Just a moment now, gentlemen, and don't answer the question as yet, doctor.

(Conference held of the three judge panel.)

[fol. 617] Judge McDermott: We think that he should answer that and should answer that under your status.

A. I would have to break that down.

I have never seen a burlesque show, and I don't know what B girls are.

Q. It is those girls that dance on Short Vincent, doctor.

A. I doubt it. As far as pictures of this type, no; not in the least.

Q. In other words, when I showed you these pictures in Defendant's Exhibit A to E inclusive, you did not get an itchy feeling?

A. No.

Q. And you were not touched with pruriency?

A. No.

Q. And when you saw The Lovers you did not get an itchy feeling?

A. Word itchy is a breaking down of the word in its various parts, and meant itching in Latin, but, actually, that is not the connotation of the word as it is used today, and I think that you have to realize that is not the definition of the word prurient as you are attempting to use it here.

Q. What I am trying to find out—

[fol. 618] Judge McDermott: That is your definition of the word itchy, doctor?

The Witness: Yes.

Q. The only thing that I am trying to bring out, and I know that this is a most difficult subject, is to tell us how, or, rather, what your personal physical reactions were to viewing the picture, and how they compare with your physical reactions in looking at these lewd and lascivious pictures which are portrayed in Defendant's Exhibits A to E, inclusive?

A. To tell you generally the difference between the still pictures as you brought out before as manifested in those

magazines and in these various art pictures, there is just stillness there in those various pictures, but in The Lovers there was action and evident passion existing between two individuals where there should not have been. There was prohibited or immoral action between two individuals. That in itself has a tendency to stimulate anybody to have sexual feelings in my opinion.

Q. In other words, would it stimulate anyone to have sexual feelings any different than perfume might have?

A. Oh, yes, certainly.

Q. Can you please describe the physical feelings that [fol. 619] you went through, and, if it is embarrassing, I will withdraw the question?

Judge McDermott: You have already asked him that before.

Mr. Osborne: This is the third time the same question was asked, your Honors.

(Conference held at this time among the three judge panel.)

Judge McDermott: Now, just a moment, gentlemen.

(Conference resumed of the three judge panel.)

Judge McDermott: Don't ask the doctor again, and that is in the record already, Mr. Terrell.

Mr. Terrell: I don't want to belabor any point here.,

By Mr. Terrell:

Q. Doctor, did you receive your prurient feeling after viewing the picture once?

A. I viewed it only once.

Q. In other words, you wouldn't have to view that two or three times to get a reaction; would you?

A. No.

[fol. 620] Mr. Terrell: I think that is all, and I hope that I have not been embarrassing, doctor, and I tried not to be.

Judge McDermott: You came as a witness and were subpoenaed, and entitled to be cross-examined; right, doctor?

The Witness: Yes.

Judge McDermott: You may step down, doctor, and thank you.

Next witness, gentlemen.

Mr. Osborne: We would appreciate a short recess before calling our next witness, John Bruere.

Judge McDermott: Short recess of 10 minutes will be taken at this time, gentlemen.

[fol. 621] Reporter's Certificate to foregoing transcript (omitted in printing).

* * * * * * *

[fol. 623] Friday, May 27, 1960, at 3:10 P. M.

Thereupon, the State of Ohio, in order to further maintain the issues on its part to be maintained, called as a witness JOHN BRUERE, who, after being first duly sworn, was examined and testified as follows:

Direct examination of John Bruere.

By Mr. Stuplinski:

Q. Will you tell us your name, please?

A. John Bruere.

Q. Where do you live?

A. 2845 Scarborough Road, Cleveland Heights.

Q. And what is your business or profession?

A. I am minister of the Calvary Presbyterian Church, Euclid and East 79th.

Q. Are you the only minister assigned to that church?

A. There is an associate pastor who is a retired Presbyterian minister on part time.

Q. I take it, then, that you are pastor of the Calvary Presbyterian Church?

[fol. 624] A. Yes, pastor.

Q. And how long have you been pastor of this particular church?

A. 16 years.

Q. Had you been a minister, or pastor, of some other church before going to Calvary?

A. I became a minister in '34 and served a church for one year at East Stroudsburg, Pennsylvania.

Q. May I ask where you went to school?

A. Princeton University.

Q. How long have you lived in Cleveland or the general vicinity of Cuyahoga County?

A. 16 years, and came here from Wooster, Ohio.

Q. You are a married man?

A. Yes.

Q. Do you have children?

A. One boy and three grandchildren.

Mr. Osborne: Bernie.

(Conference held at this time between Mr. Osborne and Mr. Stuplinski off the record and out of the hearing of the Court.)

Q. You indicated that Calvary Presbyterian Church is located at East 79th & Euclid?

A. Yes.

Q. In the City of Cleveland, Ohio?

[fol. 625] A. City of Cleveland, Ohio.

Q. Now, in your official capacity as pastor and minister there at the church, do you also belong to any civic, religious, or social organizations?

A. I am the chairman of the Cleveland Cleanup Committee, and I work through them and a great many organizations in the community.

I am also on the board of trustees of Cleveland, and work with 65 churches in the Cleveland Presbyterian area, and I am also on the Board of Directors of the Addison Road Y. M. C. A., and also I am a member of the Urban Renewal Committee, and also member of the committee of the City Planning Commission.

Q. Have you completed your answer?

A. Yes.

Q. Dr. Bruere, as a member of these various committees and organizations, do you meet with both men and women?

A. Yes, sir.

Q. Do you meet with people of all age groups?

A. Yes, sir.

Q. Do you have any dealings with children?

A. Yes, sir.

Q. Do you lecture to various organizations and clubs?

[fol. 626] A. I do occasionally.

I am not a regular lecturer at any educational institution, but I do give lectures.

Q. May I ask the subject of your lectures at this time, doctor?

A. Well, most recently—most recent one I gave a lecture to 600 student nurses on Florence Nightingale, and gave a lecture at the Oberlin School of Theology, and before that I lectured at Wooster College, and spoke to a good many service organizations, including the Rotary and Kiwanis.

Q. Does this take you through various parts of Cuyahoga County?

A. Yes.

Q. Now, Dr. Breuer, do you have any knowledge of the standards of this community with respect to a public discussion or portrayal on the subject of sex?

A. Yes.

Q. By the way, have you seen the motion picture Les Amants, or "The Lovers"?

A. I saw it last Friday afternoon at a private showing.

Q. Was I present there at that showing?

A. You were present.

[fol. 627] Q. Is that the first and only time that you saw the movie?

A. That was the first and only time that I have seen it.

Q. Dr. Breuer, from what you saw of the movie, can you tell us in your own opinion what the dominant theme of the movie was?

A. Dominant theme of the movie was illicit sex.

Q. Now, can you tell me, Dr. Breuer, whether or not you have an opinion on viewing this movie, The Lovers, taking into consideration the average person, taking into consideration the contemporary community standards, whether or not this movie arouses lustful thoughts and desires?

Mr. Kleinman: Objection.

Mr. Terrell: Objection.

(Conference held at this time among the three judge panel.)

Judge McDermott: Overrule the objection.
Mr. Terrell: Exception.
Judge McDermott: You may have your exception.
Mr. Terrell: Thank you.

Q. Do you have an opinion?
[fol. 628] A. Yes.
Q. Now, I will ask you for that opinion?

Mr. Terrell: Object to his giving his opinion here as that is the ultimate question for the Court to consider, and let him testify as to what he saw.
Judge McDermott: He testified about the dominant theme.
Mr. Terrell: Yes, illicit sex.
Mr. Stuplinski: The ultimate question is whether or not this picture is obscene.
Judge McDermott: We think that the words that the prosecutor used were substantially adequate.
Mr. Terrell: May we have the question again, if your Honors please?
Judge McDermott: Yes. I take it that the question goes to the picture as a whole?
Mr. Stuplinski: Yes.
Judge McDermott: You might add those words, and be sure that it covers everything.
[fol. 629] Judge McDermott: Now, Mr. Sato, will you read back that question?

(Question read back.)

(Conference among the three judge panel held.)

Judge McDermott: He may answer. Overrule the objection, if any.

A. I do have an opinion.
Q. And now I ask you, doctor, for that opinion? Will you give that to us, please?
A. My opinion is that this moving picture is considerably below the minimum standards of the community and greater

Cleveland community in which it was shown and of the thousand members—the adult members—of my church.

Mr. Terrell: If the Court please, it is his opinion and not about the 1,000 members.

Judge McDermott: Just a moment now, gentlemen.

(Conference among the three judge panel held.)

Judge McDermott: The answer may stand, and the witness mentioned the 1,000 members, and the other may stand.

[fol. 630] Q. Have you finished?

A. I have finished, sir.

Q. Doctor, will you state the reasons or facts upon which you base your opinion?

Mr. Terrell: Objection, unless it is his own.

Judge McDermott: Overruled, and this is his opinion.

The Witness: The reason for my opinion is—

Mr. Osborne: Just a minute, doctor.

The Witness: Excuse me.

Q. The opinion that you have stated, is that your own opinion?

A. That is my own opinion.

Q. Now, will you state the facts or the reasons upon which you base your opinion?

A. Reason for my opinion is that this picture is below the minimum standards of the community in that it portrays an incident which is never seen in the community because it is considered obscene and not to be publicized.

Mr. Kleinman: Objection, and ask that the answer be stricken and not responsive, and this is an appeal to [fol. 631] the prurient interests and not below community standards.

(Conference of the three judge panel held.)

Judge McDermott: Court will overrule the objection and let the answer in full stand.

Q. Doctor, will you elaborate the particular incident that you refer to that you have never seen before on the movie screen?

Mr. Terrell: Objection.

Judge McDermott: Isn't your question sufficient, and must he elaborate upon them?

Mr. Osborne: I would like to be heard.

Mr. Kleinman: May we have the question again?

Mr. Osborne: Shall we restate the question?

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: Court will sustain the objection with-
[fol. 632] out you going further into detail, and your question has been answered, but they may cross-examine, and the Court feel that the prosecutor should leave the question alone now, and you have got what you want without fortifying it, and it is accepted for what it is worth together with all of the other evidence.

Mr. Stuplinski: I have no further questions.

Judge McDermott: Do you have questions of the doctor, Dr. Breuer?

Mr. Terrell: Yes.

Judge McDermott: You may cross-examine.

[fol. 633] Cross-examination of Dr. John Bruere.

By Mr. Terrell:

Q. Dr. Bruere, do you believe in censorship?

A. I believe in censorship if it is demanded by flaunting of the public standards of decency, and only on those conditions, but not censorship of ideas and not censorship of conflicting political or religious positions, but censorship of obscenity, yes, I do believe in that.

Q. And as far as you are concerned, the State could do the censoring; is that right?

A. I think that public opinion can do a great deal of censoring, and in the last analysis I believe that the State would have to do it.

Q. Do you believe the league for decency in the Cleveland area should be the censors for the rest of us?

Mr. Osborne: Objection.

A. I have no opinion.

Mr. Osborne: Just a minute, Dr. Bruere.

The Witness: I am sorry.

(Conference held at this time among the three judge [fol. 634] panel.)

Judge McDermott: Court will overrule the objection.

Mr. Terrell: Thank you, your Honor.

Mr. Osborne: Well, Judge, may we at least get this clear, find out what is meant by the league for decency?

Mr. Terrell: I wish to amend that to the Legion of Decency.

Mr. Osborne: Now it is the Legion of Decency.

Judge McDermott: This case wasn't brought by the Legion of Decency but brought under the laws of the State of Ohio, gentlemen.

Q. Would you be satisfied, Dr. Bruere, to permit the Legion for Decency to act as censor for Cuyahoga County?

A. I would have—I do not know how to answer that question.

Q. You are well aware of the activities of the Legion of Decency in this community?

A. I am aware of some of them, but I have made no careful study.

[fol. 635] Q. But you do not belong to that group?

A. No.

Q. Doctor, you in acting as a Presbyterian minister do marriage counseling?

A. I do.

Q. You are well aware of the fact that a problem exists in the world today dealing with the husband and wife who become bored with one another because of the inattention of one toward another?

A. That is so.

Q. And people who have had that problem have visited with you and sought out your advice, have they not, doctor?

A. Yes.

Q. Don't you believe that people can view this picture

and get that particular message, that that is the story that is trying to be portrayed on the screen?

A. No, I do not.

Q. Let me ask you this:

Do you agree with this man's opinion:

"It was an irresistible and deliciously ironic study of the superficialities and spiritual boredom of both the well-to-do country set and the high fashion sophisticates of Paris."

[fol. 636] Mr. Osborne: Objection.

The Witness: I think that is a verbose statement, almost meaningless.

Mr. Osborne: Just a minute, doctor.

(Conference held among the three judge panel.)

Judge McDermott: Overrule the objection.

Q. Now, doctor, take your time.

A. I consider that a verbose statement with almost no content of meaning.

Q. Doctor, you know who directed this film, a man by the name of Malle?

A. I do not.

Q. Doctor, do you agree with this statement, this man's opinion:

"That Malle has imbued this part of his film with such atmospheric languor and such a superficial gloss might lead some observers, more affected by a material philosophy than they suspect, to conclude that he is expressing satis-[fol. 637] faction with it. But the ironic attitude is very definite. Throughout this segment the heroine's plight is explained in a background narrative in her voice, which has all the self-pitying sentimentality of a 'confession' magazine."

Q. Do you agree with that statement?

A. I found no such artistic acting or script.

Q. You are a Presbyterian minister?

A. Yes.

Q. And you are not a reviewer or a critic?

Mr. Osborne: That is argumentative, your Honor.

Judge McDermott: Yes.

The Witness: Will you repeat the question?

Q. Doctor, I say that you are a Presbyterian minister?

A. Yes.

Q. And you are not a newspaper critic?

A. I am not a professional newspaper critic, and that is well known.

Q. But you have seen many pictures in your lifetime?

[fol. 638] A. I have not seen many pictures in recent years. I have not.

Q. But have you seen many motion pictures in the last five years or on the legitimate stage, plays?

A. Some.

Q. And have you lectured upon those plays from the pulpit?

A. Yes, on some of them.

Q. Let me read further:

"This seductive creature, played beautifully by Jeanne Moreau, is suffering from neglect in a magnificent little country villa which she shares with an earnest and faithful husband who works too assiduously at his job of country editor. There is also a charming and affectionate daughter and a band of retainers obedient to the heroine's every wish."

Q. Did you see that in the picture?

A. I saw the charming daughter that she appealed to.

Q. I will read further, doctor:

[fol. 639] "In addition, her husband tolerates her dashing up to Paris every week to pick up bits of emotional reassurance from a stiff but very polite lover—"

The Witness: I would like to ask for a definition of tolerance. He objected to it strenuously.

Q. The polo player?

A. Her husband objected to her going to Paris.

Q. Husband objected to that?

A. Strenuously, and you used the word tolerance which indicates that it is a matter of indifference to him, and that isn't so.

Q. Wasn't he more preoccupied by running his newspaper than showing love and affection for his wife, and isn't that what we have here, doctor?

Mr. Osborne: Objection to that, and you have a double barreled question here.

The Witness: I was discussing tolerance, Judge, and I don't think that he has completely answered my question.

(Conference among the three judge panel held at this time.)

Q. You do not believe that they should have used the [fol. 640] word tolerance?

A. I think that it is inexact as the rest of his description.

Q. Are you acquainted with Paul Beckley of the New York Herald Tribune?

A. No.

Q. Whose reviews have you read?

A. I read the reviews of Mr. Ward Marsh.

Q. Plain Dealer?

A. Plain Dealer, and that is about the extent of my reading, and I read some in the Saturday Review of Literature, but I am not familiar with the authors of those articles.

Q. You think that the Saturday Review of Literature is a fine magazine?

A. I think that it is an excellent magazine.

Q. Would you find fault with the fact that its movie critic picked this as one of the seven best pictures of '59?

A. I would find great fault with it; and, if it were not so excellent in other respects, I would cancel my subscription to it!

Q. Let me read a little further from Paul Beckley's article:

[fol. 641] "It is in the second half of the film that the scenes of passion occur, but not between the heroine and the polo player, rather with a young archaeologist who offers Miss Moreau a lift when her car breaks down as she is hurrying home for the week end. At the dinner table that evening both her husband and her lover annoy her,

and she ends up by discovering in a moonlit moment that in the archaeologist she has found 'true love'."

Q. Do you agree with that?

A. I question that she thought--that she had thought that she had found true love.

Q. Based upon your entire experience, your upbringing, and so on; isn't that right, doctor?

A. I would very much question that she thought that she had found true love.

Q. But if she thought that she had found true love, you would not find any fault with what she done?

Mr. Osborne: Objection to that.

Judge McDer ott: Sustained.

[fol. 642] Q. I will continue reading from this review by Paul Beckley:

"That Malle made his scenes of passion so strong was necessary in order to give this woman a motive for driving away with her archaeologist while her husband and guests stand gaping on the lawn, burdened with fishing gear for an early morning bout of country sport."

Q. Do you disagree?

A. Do I recall her leaving her husband and her lover?

Q. Yes.

A. Yes.

Q. Do you disagree with the author's comment on that?

A. I am afraid that you will have to read that again.

Q. Very well.

This is a long sentence, doctor, but only one sentence:

"That Malle made his scenes of passion so strong was [fol. 643] necessary in order to give this woman a motive for driving away with her archaeologist while her husband and guests stand gaping on the lawn, burdened with fishing gear for an early morning bout of country sport."

Q. Do you agree with that statement, doctor?

A. I think that is the most ridiculous statement you have read yet, and it is like saying that he would have to portray something so indecent that it automatically gives the woman

the right to throw all conventions to the wind and do what she did; and that is no justification for his portraying something so indecent as to accomplish that result.

Q. Let me read further:

"But one need only consider the poignant scene in which the silly creature kisses her sleeping daughter goodbye or her frantic doubts as she drives off into a future conceivably cluttered with motels and archaeological digs to realize that Malle is by no means expressing approval of [fol. 644] her behavior or her ultimate decision."

Q. Do you agree with that?

A. I have no reaction, and I don't know what he was at that point trying to portray.

Q. I will read further;

"On the contrary, he is pointing up the absurdities of human behavior which can result from becoming mired in an environment which form and conventions"—my eyes are getting bad—"where form and conventions take the place of reality."

Q. Is that clear, or should I read that again to you, doctor?

A. It is perfectly clear, and it says that in order to portray the characters, or the situations, this man considered it essential to describe in vivid detail the love scene obscenity.

Q. All right.

In other words, you disagree with that sentence, doctor?

A. I don't disagree with what he may have been forced to do, but with his inability to do something better.

[fol. 645] Q. You and Mr. Paul Beckley are at odds?

A. I feel perhaps that we are.

Q. That is what I am driving at.

Do you agree with this statement from Mr. Beckley's review:

"If he does not express his disapproval in a providential car crash as the lovers escape, he does manage to leave the viewer with a sense of shock, a sense of tragedy that is all the more affecting after the leisurely sensuousness

of the early sequences and the sensual abandon of the latter."

Q. Now, you agree with that sentence, doctor?

A. I have seen this essentially happen in such sordid circumstances that I would not agree with this in any sense.

I am sure that I would disagree with everything that you have read.

Q. But that does happen, doctor, and you have seen that happen in your own church, where people have given up their children and worldly possessions and taken off with some never-do-well?

[fol. 646] A. Yes, sir, but I have never seen anything in those cases that was obscene, in vivid detail, as in this picture.

Q. When you say obscene, that is your conception of what you observe, and that is what you see through your eyes?

A. What other would you expect?

Q. That is all that you are testifying to, your opinion.

A. But you are asking my opinion about other people's reactions.

Q. Yes, and I want to read the last question, too, and we will leave Mr. Beckley for a moment:

"Everything, including certainly his astute and sensitive camera work, contributes to this final sense of discomfort. Thus, there can be no question but that so knowing a director intended to do just what his film in fact does."

Q. Do you agree with that statement, doctor?

A. That is meaningless, and double talk, and it says nothing.

Q. Says nothing as far as you are concerned, doctor?

[fol. 647] A. I can't speak for you, sir.

Q. I don't think I have insulted you yet, doctor, have I?

A. Not yet.

By Judge McDermott:

Q. It means nothing as far as you are concerned?

A. Pardon.

Q. I said, that it means nothing then as far as you are concerned?

A. That is correct. It is double talk and says absolutely nothing.

Judge McDermott: I will sustain the objection to that question, and it is in the form of an argument anyway.

By Mr. Terrell:

Q. Doctor, let me ask you this:

After that sex scene, or bedroom scene—if that sex scene, the bedroom scene, were clipped out of the picture, would the picture then be obscene in your estimation?

A. Obscenity would not be as explicit, and there would still be by implication the remainder of the obscenity in the picture; yes.

Q. In other words, the elements of obscenity would be reduced—would be retained due to the fact that there was [fol. 648] an adulterous relationship or illicit love affair, doctor?

A. Yes, but I am not sure that there is some camera work—and I am not sure where that came.

Q. Doctor, you saw the map at the beginning of that picture?

A. Yes.

Q. Did that have any significance as far as you are concerned, the map?

A. It probably would not have had not the suggestion been made that it was symbolic, and I have no opinion, and I do not know.

Q. Who made the suggestion that they were symbolic, doctor?

A. The suggestion wasn't made that it was, but the question was asked whether or not when we viewed it we would consider it as such, and look at it and see what we thought.

Q. That was asked of you by Mr. Stuplinski, was it not, doctor?

A. Either by him or Mr. Osborne, and I do not remember, but there was no leading of my reaction, and he said:

"Do you see anything symbolic in the map?"

Q. But the map by itself, you do not see any dirty?

[fol. 649] Q. You do not see anything dirty in the map itself, do you, doctor?

A. I don't know, and I didn't draw the map, and it could or could not be.

If you are an expert on modern art, you will know, but I don't, to be honest.

Q. That is all that I want you to be, honest.

A. That is exactly what I am trying to do.

Q. Doctor, there is nothing symbolic or significant to you about that map?

A. I did not say that.

Q. Tell me what is significant or symbolic; will you please?

Can you tell me?

A. What is significant about the map?

Judge McDermott: Don't you think—doctor, we think that you have answered that question.

The Witness: Thank you.

Q. Doctor, are you aware of the fact that we have a burlesque house in Cleveland?

A. Yes.

Q. Have you ever attended a burlesque show?

A. I have when I was a member of the Mayor's Committee, and we attended to ascertain whether or not ju- [fol. 650] veniles were attending.

Q. When you attended that performance, I presume that it was in the Roxy Theater?

A. Yes.

Q. And can you tell us the type of entertainment that was in the Roxy Theater?

A. Is this essential, that he does not know what goes on in the Roxy?

Judge McDermott: Doctor, we are bound by certain rules of procedure, and the defense has a right to ask questions like that of you.

The Witness: I shall answer them, and I am not easily embarrassed, but I will not speak for you, sir, before you are through.

Mr. Terrell: Doctor, I don't know why you are so antagonistic toward me.

I am asking questions not for the purpose of embarrassing you, sir, but merely trying to bring out what you know, and I know what goes on at the Roxy, and this must all go into the record.

Judge Pincura: Why don't you ask the doctor the ulti-
[fol. 651] mate question with respect to the Roxy, and this is obvious.

Q. Tell us what you saw taking place in the Roxy Theater?

A. In general, females disrobe, and there is little or no clothing left.

There is not a naked male present nor are two of them portrayed in a bathtub together, and I feel that you are stultifying to me, sir, in asking these questions.

Mr. Osborne: We will ask that the last part of his answer be stricken from the record.

Mr. Terrell: I request that it remain because that shows the attitude of the witness.

Judge McDermott: They may remain in the record, and he is entitled to his own opinions.

Mr. Terrell: Thank you, your Honor.

By Mr. Terrell:

Q. Doctor, have you traveled in other cities throughout the United States?

A. Some.

Q. Have you been in the city of New York?
[fol. 652] A. Yes.

Q. Do you know that this picture has run in New York for over a year?

A. No.

Mr. Osborne: I must object.

Mr. Terrell: He said, no.

Q. Do you know that this picture has run in the city of Toledo for some period of time?

The Witness: Is this germane to the issue here?

Judge McDermott: Yes.

The Witness: I don't know.

Judge McDermott: Doctor, you are here, and from your background you are allowed to give your opinion, but it does give the right to the defense for cross-examination.

The Witness: I will abide by your decision.

Judge McDermott: Some questions have been rough for all witnesses, but the Court must allow them.

The Witness: I see.

Q. Do you think that the performance at the Roxy is an obscene performance?

Judge McDermott: Yes or no, doctor.

[fol. 653] The Witness: Yes.

Q. And in your opinion it does not meet with the community standards; does it?

A. No.

Q. It is below the standards that you speak of, considerably below the standards of this community; isn't that right?

A. Yes, it is below the standards of the community. That is correct.

Q. And that has been tolerated and permitted to run in the city of Cleveland for better than sixteen years?

Judge McDermott: If you know.

A. Are you asking me?

Q. Yes.

A. Yes, so far as I know, it has.

Q. Is there anything else that operates in the city of Cleveland or Cuyahoga County that is below the standards of the community, dealing with literature, movie theaters, or any other type of entertainment in your opinion?

Mr. Osborne: Objection, and may I be heard.

(Conference held at this time among the three judge panel.)

[fol. 654] Judge McDermott: If the doctor can answer, he may.

If you don't know, say so.

A. I feel that some of the magazines that are displayed are obscene.

Q. Can you name some of them, please?

A. No, I would not name some of them unless I made sure that I was naming the right ones.

Q. Is there anything else that you know of, or in your opinion is below the standards of this community that is circulating on the newsstands?

A. No; I do not.

Q. Have you read the book Lady Chatterley's Lover, doctor?

A. No.

Q. Do you know whether or not that is circulating on the news stands here?

A. I have seen copies of it.

Q. And are you acquainted with the contents of the book?

A. I am in a general way.

Q. And in your opinion is that book obscene or lewd?

A. I have no opinion, and—

Q. Have you read the book From Here to Eternity, [fol. 655] doctor?

A. No.

Q. Have you read the book, No. 10 North Frederick Street?

A. No.

Q. Have you read Anatomy of a Murder?

A. No.

Q. Have you seen the motion picture, Anatomy of Murder?

A. No.

Q. Are there any motion pictures or plays that you have attended within the last year that you feel fall below the standards of the community, as you have described below?

A. Yes, I saw one which I feel fell below that.

Q. Which one is that?

A. Ten Commandments I believe fell below that.

Q. Can you tell us in what respect Ten Commandments fell below the standards of Cleveland, Ohio, doctor?

A. I believe that there are scenes that incite to lustful behavior.

Q. That played in Cleveland for a long period of time?

A. I am not aware how long it played.

[fol. 656] Q. But it did play in Cleveland?

A. I saw that in Cleveland.

Q. And is there any other motion picture that you saw that fell below the standards of this community, doctor?

A. No.

Q. Did you see, Some Like It Hot?

A. No.

Q. Can you tell us the name of any motion picture or play that you have seen recently, that you can recall, doctor?

A. I am trying to think, and there have been only three or four that I have seen during the past year.

I saw the Big Fisherman.

Q. You found nothing offensive about that, did you, doctor?

A. Yes, I found something offensive about that.

Q. Will you tell us, was there anything about the Big Fisherman that was obscene?

A. I think there were portions that would invite lustful reactions unnecessarily.

Q. Could you tell us which portions?

A. I cannot recall.

Q. Can you tell us what other pictures you may have seen?

[fol. 657] A. Well, I have seen two or three others, but not more than three or four in the past year.

Q. Did you see Ben Hur?

A. Yes, I saw Ben Hur.

Q. What is your reaction to Ben Hur?

A. I found nothing in that obscene.

Q. Have you been to the Playhouse recently, doctor?

A. I have not.

Q. You have not seen any of their productions, doctor?

A. That is right.

Q. Have you seen productions at the Hanna Theater, the legitimate theater?

A. Yes, and I have seen one. Again I will have trouble recalling that, but it was about the Book of Job.

Q. J. B.?

A. Yes: J. B.

Q. Did you find anything offensive in that, doctor?

A. No.

Q. Doctor, I am going to show you a couple of the magazines that you talked about before, and will ask you if these

were the ones that you had in mind that were obscene, and I [fol. 658] am referring to Playboy, Defendant's Exhibit A?

A. That has been cited for obscenity, and I believe that it would have material in it.

Q. I don't wish to do this for purposes of embarrassing you, and I say that in all sincerity, doctor.

I show you pages 44, 45, 46, showing an undraped woman.

A. I do not consider nudity necessarily obscene, and, for instance, Venus de Milo is not obscene, and I would not consider that book obscene.

Q. You would not consider that obscene?

A. No.

Q. But you would not have that in your own home?

A. That is neither here nor there, where I would have it.

Q. Very well.

You feel that this particular picture in Playboy would not shun your sense of sensibility?

A. It would not destroy your motion picture to me in any sense of the word, and I thought that is what I was here to discuss, and that motion picture represents an act that is something that is so obscene and I never before saw—

Q. I did not invite you down here, nor did I subpoena [fol. 659] you down here, doctor.

Judge McDermott: Under the due process clause a man's constitutional rights are involved, and some of these questions are rough, but the Court will allow some latitude, but respects your right to think for yourself, doctor.

Mr. Terrell: I ask that the latter part of his answer about the motion picture being obscene go out, because that wasn't responsive to any question.

Mr. Osborne: Yes, we will agree to that.

Judge McDermott: Let the latter part be stricken from the record.

Mr. Terrell: I am trying to remain as proper as I know how.

Judge McDermott: The Court understands.

Q. I am referring you to what has been marked for purposes of identification as Defendant's B, Gent magazine.

Have you ever seen this copy.

A. I haven't seen that copy, but I have seen that on the news stands.

[fol. 660] Q. What is your opinion?

A. I have no opinion, and I would want to study that.

Judge McDermott: Mr. Terrell, those are Exhibits A to D, inclusive; is that right?

Mr. Terrell: Yes.

Judge McDermott: Because of the law and because they are pertinent, the Court allowed those five magazines to be put in evidence, and he has a right to ask you some questions on them.

The Witness: Yes, sir.

Q. Doctor, I am referring to Defendant's Exhibit B, page 39, 40, 41, 42, 43, and I will ask you to look at those, please?

A. Will you show me one with a naked man and woman together?

Q. Why do you argue with me?

I asked you a simple question about this magazine, doctor.

A. These are pictures of nude women, and they are not performing the sex act, and no nude male is present, and they would not be the kind of obscenity that I am here to object to, and does that answer your question, sir?

[fol. 661] A. It certainly does.

Q. Look at Rogue magazine.

A. Let me see if I can find here what I saw in the motion picture, and I see no sex act, and according to the obscenity that I am here to protest, this is not in it; not in this magazine.

Q. How about Cavalier magazine?

A. Again, nude women, and I see no nude men and women together, and I see no sex act being performed as there was in the movie, and I see nothing obscene in these magazine pitcures.

Q. In other words, these magazines in your opinion are not obscene?

A. They are not the kind of obscenity that I am here to protest.

Q. I did not ask you that.

I asked you, are these magazines obscene, doctor?

Judge McDermott: In themselves, doctor.

Mr. Terrell: I am not concerned about comparing them with the picture.

Judge McDermott: If the doctor has an opinion, if you [fol. 662] have an opinion, doctor, you may state it.

The Witness: May I preface, if this is not out of order, may I preface this one comment, that in obscenity as in all other categories of human conduct there is a wide range, and that is the reason for my hesitation to apply the same label to this as to the movie picture; and if I am permitted to say so, I do consider those obscene, but not in the same category of obscenity.

Is that out of order?

Q. In your opinion, these are obscene, and forget about the picture?

A. I have answered your question.

By Judge McDermott:

Q. Your total testimony away from these five exhibits has to do with the picture you saw?

A. Yes, sir, and I am not here to testify about the magazines.

By Mr. Terrell:

Q. Doctor, have you seen a statue of Rodin's Keys, where the man and woman are together?

A. Yes, I have.

Q. Will you describe that to us, please?

A. There is a difference between a statue and a motion [fol. 663] picture, and that makes a considerable difference in the portrayal of an act, and the intent, I would say, wasn't obscene.

That to my mind would not be obscene, and I wouldn't consider that obscene.

Q. You are telling us what Rodin intended?

A. I am not sure that I can tell you what he intended, but Rodin was a great artist.

Q. But he was a great artist, was he not?

A. Yes.

Q. Are there any other pieces of art that repose in our Art Museum today that you find obscene, doctor?

Mr. Osborne: Objection to that, and I wish to be heard.

(Conference held at this time of the three judge panel.)

Judge McDermott: Court will sustain the objection to the Cleveland Museum of Art.

Q. Is there any other art or any other literature that you have not told us about, doctor, which falls considerably below the standards of the community that you wish to comment on?

Mr. Osborne: Objection to that, your Honors.

[fol. 664] A. None.

Judge McDermott: He said, no, and the Court thought that it was a very broad question.

Mr. Terrell: It was intended to be a broad question.

Q. While serving on the Mayor's Committee for Juvenile Delinquents and studying juveniles, did you have occasion to attend any of the bars, or entertainment places, along Short Vincent Street, Ninth Street, and Chester Avenue, and environs?

A. I did not personally, but I think that Captain Roth did.

By Judge McDermott:

Q. Did you?

A. No.

By Mr. Terrell:

Q. Have you ever attended any of the other places of entertainment in the city of Cleveland that you found fell below the standards of the community, doctor?

A. No.

Q. Doctor, in viewing the picture, "The Lovers," did you at any time ever see the genitalia of either the man or woman?

[fol. 665] A. I don't believe so.

Q. Did you at any time in viewing that picture, doctor,

see the man and woman below—that is, undraped below the hips?

A. I think not.

Q. As a matter of fact, everything that you have already—everything that you decided about this picture comes from seeing the picture, and imagining everything else; isn't that right, such as illicit sex, and so forth?

A. The portrayal was such that nothing else could be imagined, and the answer is affirmative.

Q. In other words, you state you—you state what you saw through your eyes, doctor, and not what actually took place?

Mr. Osborne: Objection to that, and—

Judge McDermott: He has answered that.

Sustain the objection.

Gentlemen, what you say back and forth to each other doesn't count in the case whatsoever.

Q. Doctor, I presume you are well acquainted with the Fourth Chapter of Romans, Verse 14?

[fol. 666] A. No, but I am willing to have my memory refreshed.

Q. All right.

"I know, and am persuaded in the Lord Jesus, that nothing is unclean of itself; save that to him who accounteth anything to be unclean, to him it is unclean."

Q. Do you recall that?

Mr. Osborne: Chapter 14 and not Chapter 4.

Mr. Terrell: That is true.

The Witness: I would be interested, Judge, in knowing how this verse came to this gentleman's attention, and would I be out of order to ask him?

Judge McDermott: Today, you have got to answer questions and not ask them, doctor.

Mr. Terrell: Chapter fourteen, fourteen.

The Witness: All right.

Let me see what edition this is first.

All right. Fourteen, fourteen.

"I know, and am persuaded in the Lord Jesus, that noth-
[fol. 667] ing is unclean of itself; save that to him who ac-

counteth anything to be unclean, to him it is unclean. For if because of meat thy brother is grieved, thou walkest no longer in love. Destroy not with thy meat him for whom Christ died."

Sir, the exegesis of this passage deals with unclean meat, and I am asking you, what was your question?

Q. Is that passage in the Bible, and the only reason that I ask of that of you, sir, is to try and portray that everything that was seen in The Lovers and so-called magazines, and the burlesque house, everything else is what was portrayed through your mind that you as an individual saw?

A. No, you are entirely in error, sir, in what you are saying.

You haven't given this five minutes thought, to this, or you wouldn't say this, and I can't sit here and have you misquote scripture.

Q. However, your opinion, and that is your own personal opinion, is what you have been quoting and telling us today here in this court?

[fol. 668] Mr. Osborne: Objection to the repetition.

(Conference held at this time of the three judge panel.)

Judge McDermott: Sustain the objection, and that is his opinion.

Q. Are you acquainted with the community standards, are you not?

A. I am, sir.

Q. And will you please tell us how you arrived at the community standards?

A. You arrive at community standards by discovering that there are certain things that people respect generally, and there are other things for which people have an aversion, and that is how you would arrive at some notion of community standards.

Q. Do you take into consideration the fact that we have over a million people in Cuyahoga County and this is a heterogeneous community made up of many different kind of people?

Would you take that into consideration?

A. I have all kinds in my own church.

Q. You have people of the high and the low, doctor?
A. Yes.

[fol. 669] Q. And those people that are in your church, they give you an idea of the community standard?

A. That is only one source, and I have many contacts with people apart from the church, and there are other groups and individuals.

Q. Doctor, would you say that the community standards of Toledo, Ohio, are different from Cleveland?

A. I am not familiar with Toledo.

Q. Are you familiar with Columbus, Ohio?

A. No.

Q. New York City?

A. No.

Q. Detroit, Michigan?

A. No.

Q. What city are you acquainted with?

A. I am acquainted in the sense of being able to answer your question with Cleveland only; for the last sixteen years I have put in an eighteen hour day in Cleveland with all kinds of people from bum on up, and I know Cleveland, but I don't pretend to know all those other cities.

I do know Cleveland.

Q. I want to know if in your mind there is anything different about community standards of our locale compared with other cities?

[fol. 670] A. I can't answer your question.

Q. How do you arrive at the average man who has normal sex instincts because it is to him that we are directing our questions.

Judge McDermott: Now, wait. You said man.

Mr. Terrell: I mean man and woman.

A. You are using man generically?

Q. Yes.

A. What was your question?

Q. How do you arrive at who the average person is with normal sex instincts?

A. Same way I try to preach to the average man and talk to the average man, and try to say something that benefit them and uplift them.

Q. As a matter of fact, you are constantly endeavoring

to raise the limits of people that you come in contact with, and you want them on a higher plane, on a more God fearing plane?

A. Yes.

Q. And in so doing, and if I am incorrect you tell me—

A. I shall.

Q. —to raise community standards of the city of Cleve-
[fol. 671] land?

A. That is part of it.

Q. Because if you had your way you would do away with all of these books and magazines that are on the news stands—

A. I did not say that.

Q. I am saying that.

A. I am contradicting you.

Mr. Stuplinski: Objection to the argument.

Judge Pincura: He said, no.

Q. All right.

If you had your way to determine community standards, you would do away with the Roxy and the burlesque houses?

A. I would not.

Q. Would you permit them to run the way that they have been running in the past?

A. My only object is to raise the standards of the people that live in Cleveland, and some things will be taken care of by the people in general, and by the proper authorities; and if I were offered a dictatorship, I would not abolish the magazines or close the Roxy Theater, but that will come about naturally through community action as intelligent public opinion begins to make itself felt.

[fol. 672] Q. But as they exist now, they are still running and still in operation, and accepted in this community, doctor?

Mr. Osborne: I will object to the three parts of the question.

A. There is the most limited acceptance of any of these things.

Q. And that is by the people that you come in contact with; isn't that right?

A. I don't understand the question.

Q. All right.

Do you know of any books that are on the stands, and I have probably asked you this, but in addition to what you have testified to, are there any books on the stands that don't come up to the standards of our community that you have not mentioned?

A. If I answer this question, I will have to qualify that, and there is a great mass of junk that doesn't come up to any standards, and that isn't what he is driving at, and there are a lot of things that I know of where I feel police officers should walk in.

Q. You tell us what junk you are referring to, doctor?

Judge McDermott: Pretty broad, and sustain the objec-
[fol. 673] tion.

Mr. Osborne: You don't have to answer that, doctor.

The Witness: Beg pardon?

Judge Pincura: Ask the doctor what he means by junk literature, and he might be able to define that for you.

By Mr. Terrell:

Q. Can you tell us what junk literature is, doctor?

A. I think we have a good illustration in the statement that you read where there is no content meaning, and there is no real thesis being developed, and no story teller's art involved in the process, and there is a great deal of that sort of material lying around. I don't speak as a first hand authority.

Q. Doctor, do you know that this picture, "The Lovers," was picked as one of the best ten foreign pictures for '59 by Bosley Crowther of the New York Times?

A. I don't know that.

Q. You don't know that?

A. No, I don't.

Q. Do you know, doctor, that this picture, "The Lovers," won the second prize at the Venice Film Festival in '58?
[fol. 674] A. Yes, I heard that.

Mr. Terrell: That is all.

Judge McDermott: And now, Mr. Prosecutor, anything further?

Mr. Stuplinski: Yes.
Judge McDermott: Proceed.

[fol. 675] Redirect examination of John Bruere.

By Mr. Stuplinski:

Q. Dr. Bruere, I will hand you this Bible, and this is the King James version containing the old and new testaments, and refer to The Epistle of Paul the Apostle to the Romans, and Verse 14, and Chapter 14, and read that, and give us the exegesis of that, please?

Judge McDermott: Didn't he read that before?
The Witness: I did not give that, and I would like to have that in the record.

"I know, and am persuaded in the Lord Jesus, that nothing is unclean of itself; save that to him who accounteth anything to be unclean, to him it is unclean. For if because of meat thy brother is grieved, thou walkest no longer in love. Destroy not with thy meat him for whom Christ died."

[fol. 676] A. St. Paul here is not laying down the principle that was brought out about the news stands concerning this version, that there was nothing good or bad, but thinking made it so, and that is made in Shakespeare's Hamlet, but not in St. Paul's Epistle to the Romans.

St. Paul referred to the early Christians buying meat at a cheaper price when there were sacrifices of animals in heathen temples, and they did not know what to do with the meat, and sold that at reduced prices, and the Christians wanted to buy that at reduced prices, but some of them felt that if they ate the meat sacrificed to an idol that that was desecration to their religion, and St. Paul said nonsense, and meat is meat; but if your brother doesn't understand and sees you standing in line to buy the cheaper meat, and he thinks that you are giving up the religion, then for meat's sake don't destroy your brother's faith, and buy your meat somewhere else.

I certainly resent, your Honors, the implication of the use of scriptures in this court.

Mr. Stuplinski: Thank you very much, Dr. Bruere, and I have no other questions.

Dr. Bruere: If I have been in any way disrespectful, I wish to apologize, and I am not accustomed to this sort [fol. 677] of thing, gentlemen.

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[fol. 762] May 31, 1960

Thereupon, the defendant, in order to further maintain the issues on his part to be maintained, called as a witness RABBI ARMOND E. COHEN, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Rabbi Armond E. Cohen.

By Mr. Terrell:

Q. Will you please state your name and address?
A. Armond E. Cohen, 3273 Euclid Heights Boulevard.

By Judge McMahon:

Q. Please be good enough to hold up your voice, and will you give us your name and address again for the record?
A. Armond E. Cohen, 3273 Euclid Heights Boulevard.

By Mr. Terrell:

Q. Could you tell us what your business or occupation is?
A. Clergyman.
Q. And for what congregation?
A. Park Synagogue, Cleveland Heights.
Q. How long have you been Rabbi of the Park Synagogue?
[fol. 763] A. 26 years.
Q. Can you tell this Court your background and education, Rabbi?
A. Elementary school education was in Canton, Ohio, where I was born, and then went to Cleveland, and graduated from Glenville High School in Cleveland, and then attended New York University, where I received a Bachelor of Arts Degree, and then attended the Theologian Seminary

of America, New York, where I received my theosophy degree, and a degree of Master of Hebrew Literature.

Q. After that, did you continue your education, Rabbi?

A. Yes, I did graduate work at the foundation for—American Foundation for Religion and Psychiatry, in New York City.

Q. How long did you take courses dealing with religion and psychiatry after being ordained as a Rabbi?

A. About two years.

Q. Can you tell us a little bit about what took place and what was discussed in that particular course, Rabbi?

A. Clergy of all denominations, trained and not trained, of all denominations in pastoral psychiatry and family counseling, and elementary dynamic personality develop-
[fol. 764] ment.

Q. Rabbi, you have been connected with Park Synagogue for 26 years?

A. Yes.

Q. Have you had any other functions such as heading any committees or take part in any seminars?

A. Take part in a great many seminars, and Chairman of the Committee on Family and Marriage of the conservative denomination.

Q. And as Chairman of that committee, will you tell us what some of your functions are?

A. Committee makes studies on family relations among the Jewish people, and conducts institutes throughout the country for the clergy in the conservative denomination to train them better in family counseling techniques.

Q. Do you have occasion to come in contact with many people in your duties as a Rabbi?

A. I hope so.

Q. What I am driving at is this:

Do you have the means of knowing what the contemporary community standards of our county are by virtue of the fact that you meet with so many people throughout the year?

A. I think I get a fair idea of what community standards
[fol. 765] are in some areas.

Q. Would you have an opinion, Rabbi, about what the

average person is, and we are taking that into consideration, what the average person is in our community?

A. In what respect?

Q. Well, in dealing with the subject of obscenity or appealing to the prurient interest?

A. I have a notion that I know what an average reaction is.

Q. Would it be fair to say that the average person is more or less a normal person?

Mr. Osborne: I will object, if the Court please.

Judge McDermott: Rabbi could answer that.

Q. Court ruled that you can answer that.

A. That the average person is normal?

Q. Yes.

A. It would be more accurate to say that the average person is average, and I think normal, and that is a fairly correct statement.

Q. But you are acquainted with the community standards of our county, and you have an idea who the average person is, taking into consideration the contemporary community [fol. 766] standards?

Mr. Osborne: Objection, if the Court please.

(Conference held at this time among the three judge panel.)

Judge McDermott: Overrule the objection.

A. Yes, I think so.

Q. Rabbi, did you have the occasion to see the motion picture, The Lovers?

A. Yes, I did.

Q. And were you there at my invitation?

A. Yes.

Q. And were you shown the picture about—on Payne Avenue, at a private screening?

A. Yes.

Q. And you saw the picture at that time?

A. Yes.

Q. Did you ever see the picture at any other time, Rabbi?

A. Yes, I saw the picture sometime ago in New York City.

Q. After viewing the picture, would you have an opinion about what the dominant theme of that picture was?

[fol. 767] A. I think the dominant theme of The Lovers is a story of an upper middle class French couple whose marriage comes to grief due to kindly and considerate but indifferent conduct on the part of the husband to his wife, who has a great capacity for human love, and who, not having had it tapped in relationship with her husband, finds it exploding when a lover, who is a sensitive and understanding student, unprepossessing, establishes a relationship with her; and you have the enormous love—enormous power of this woman's love that has been restrained becoming quite explosive and destroying this marriage.

Q. Rabbi Cohen, is that one of the problems that we face in marriage counseling today, where boredom sets in and where people have all the worldly goods that they can acquire and still have a desire to seek other company?

A. Yes, that is not an uncommon cause of the failure of contemporary marriage, inability of the husband and wife to establish a full, reciprocal, mutual loving relationship.

Q. Does this picture portray that particular problem, Rabbi, in your opinion?

A. I think that is probably the theme of the picture as I understood it when I first saw that movie in New York.

[fol. 768] Q. Can you tell us whether or not that picture also was portrayed with tenderness and in good taste, Rabbi?

Mr. Osborne: Objection, if the Court please.

(At this time, there was a conference of the three judge panel.)

Mr. Osborne: Withdraw the objection, Judge.

Judge McDermott: All right; the objection is withdrawn. Go ahead and answer, Rabbi Cohen.

A. I thought that the picture was portrayed tenderly, and I found it not offensive to my own taste.

Mr. Osborne: Objection to the last statement.

Judge McDermott: The last part of the answer—

(Conference of the three judge panel held at this time.)

Judge McDermott: The answer may stand.

Q. In your opinion, does this picture as a whole from the [fol. 769] time that the credits are on the screen, from the beginning, until the picture ends, would you have an opinion as to whether or not the dominant theme of this picture appeals to the prurient interest of the average person, taking into consideration the community standard?

A. By no means.

Q. This does not appeal to the prurient interest, Rabbi?

A. I think that it does not.

Q. As you viewed this picture, Rabbi Cohen, did this picture at any time appeal to your prurient interest?

A. I did not find this picture sexually stimulating, personally.

Q. Rabbi, in examining the entire picture as a whole, that is, taking the four corners, do you have an opinion as to what the dominant theme was, and am I repeating myself, or can you elaborate on your original statement as to the dominant theme, dealing with boredom, etc.?

Mr. Osborne: Objection, if the Court please.

(Conference held of the three judge panel at this time.)

[fol. 770] Judge McDermott: Sustained, and repetitious.

Q. Rabbi Cohen, the subject of sex and adultery, is that a common subject today for literature and motion pictures?

A. Quite common.

Q. And the subject in and of itself, either adultery or sex, would not appeal to the prurient interest of the average individual.

Would that be a fair statement to make, Rabbi Cohen?

A. Sex is not evil. Sex appeal to the prurient interest—sex is one of the Divine endowments, I think, that we all have, and not an evil.

Q. Do you think that this picture so portrays the tremendous power that love can generate that people will give up their worldly possessions for love and affection?

Mr. Osborne: Objection, if the Court please.

A. I think this picture indicates in regard to love that it is both a very creative and can be a very destructive force.

Q. Rabbi Cohen, could the average man gain some lesson of social significance by viewing this picture, The Lovers?

[fol. 771] Mr. Osborne: Objection, if the Court please.

(Conference among the three judge panel held.)

Judge McDermott: Objection is sustained.

Q. Is there any social significance borne out by this picture, and does it deal with a subject that is commonplace today?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Objection is overruled.

A. I think that there is considerable social significance to this, and I think it is an intelligent view, and gives a social message.

Q. Would the average person get a social message from this picture?

A. Could.

Q. Well, would the average person—would this picture tend to incite to the prurient interest of the average person?

[fol. 772] Mr. Osborne: Objection to the repetition.

Judge McDermott: Objection is sustained.

Q. Can you elaborate, Rabbi Cohen, on the social significance that an intelligent person could derive from this picture?

A. Yes.

I think that an average intelligent person of normal mind and good mental health, and good emotional setup, would see a powerful message in this movie, namely, the importance of developing a sensitive, understanding, marital relationship, and fully exploiting the capacity to love of both partners in a marriage, and also see the grave dangers

that are imminent when the reservoir of love overflows and when it is neglected.

Q. Anything else that you can say about this, this picture, Rabbi?

Mr. Osborne: I object, if the Court please.

Judge McDermott: Just a moment while we confer.

(Conference held at this time among the three judge panel.)

[fol. 773] Judge McDermott: Sustain the objection.

Mr. Terrell: You may take this witness.

[fol. 774]

Cross examination of Rabbi Armond E. Cohen.

By Mr. Osborne:

Q. Rabbi, you testified that you saw this picture in New York?

A. That is right.

Q. And you saw it in Cleveland?

A. Right.

Q. Where in New York did you see it?

A. Movie house.

Q. Which one, Rabbi?

A. I believe on 57th Street, and I am not certain about it, and I believe that you call it the Paris Theater.

Q. And when did you see it in New York?

A. I believe I saw it either last—fall or spring, but I am not sure about the exact season.

Q. And in the State of New York there is motion picture censorship; is there not?

Mr. Kleinman: Objection.

(Conference held at this time among the panel of three judges.)

A. I—

Judge McDermott: Just a moment, Rabbi.

[fol. 775] (Conference resumed among the three judge panel.)

Judge McDermott: Overrule the objection.

A. I don't know.

Q. You don't know?

A. I don't know.

Q. Now, the picture that you saw in Cleveland, there was more to the picture than what you saw in New York; isn't that right?

A. I am unaware of that, and I did not sense that much difference, and I wasn't aware of any differences then as now.

Q. As a matter of fact, in New York, 141 feet of deletions were made from that film. Isn't that true?

Mr. Kleinman: Objection, if the Court please, and how would he know?

Judge McDermott: If the Rabbi can, he may answer.

A. I would not know.

Q. As a matter of fact, in the film that you saw in New York, in the bedroom sequence, that portion where the night gown was removed, that was eliminated, wasn't it?

[fol. 776] A. I do not recall that.

Q. And in New York, in the bedroom sequence, where the couple were apparently in the nude, the close embrace and moving toward the bed, that was eliminated, wasn't it?

A. I don't remember any distinction, frankly, between what I saw in New York and what I saw here, and I don't have a recollection of that.

Q. As a matter of fact, the picture that you saw in New York, closeup view of the man and woman kissing as they moved out of the bed, that was eliminated, wasn't it?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: If he knows.

Mr. Kleinman: He said he doesn't remember.

The Witness: No, I do not know that.

Q. In New York, the film that you saw in New York, you did not see him kissing her on the neck and bosom, and those scenes were eliminated?

A. I would not know that.

Q. And in New York the closeup view of her lying on [fol. 777] the bed with her breasts exposed as she reacted erotically, that was eliminated; wasn't it?

A. I am not aware of that.

Q. All right.

In the New York version that you saw the view of the embracing on the bed in which she partially raises her body to meet his, and the closeup view of her convolusive reaction, this is after the bathtub scene, that was eliminated, wasn't it?

A. I don't know.

Q. And in New York the scene of the couple apparently nude, lying face down in the bed, that was eliminated?

A. I would not know.

Q. And the New York version which you saw, the views of her fondling the man's head, and kissing his bare back, and her writing on his bare back with her finger, that was eliminated?

A. I don't remember.

Q. And, as a matter of fact, in the New York version, the views where she raises her body from his body, exposing her nude breasts, that was eliminated, wasn't it?

A. Apparently, these scenes did not make that much impression on me.

[fol. 778] Q. You have testified that you received no sexual stimulus as a result of seeing the picture?

A. I did not receive any.

Q. Would you say that the dominant theme of this movie concerns sex?

A. I would say it concerns the frustration of sex.

Q. But it does involve sex?

A. Yes.

Q. Now, Rabbi, what sex act or acts did you see in the film, or did you infer from the viewing of the film?

Mr. Kleinman: Objection, if the Court please.

Mr. Terrell: That is a double barreled question, and sex scene is inferred.

Judge McDermott: The prosecutor is entitled to an answer.

Mr. Osborne: I will withdraw that question.

Judge McDermott: All right; the question is withdrawn then.

Q. Now, as the woman lay on the bed prior to the bathtub scene, would you describe her state of dress or undress?

[fol. 779] A. As I recall, the upper portion of her body was nude.

Q. Did you see the lower portion of her body?

A. No.

Q. She had, before that, a night gown on; isn't that correct?

A. Right.

Q. And you saw the scene whereby he removed the straps of her night gown from the shoulders?

A. Yes.

Q. And you saw the nightgown disappear from view and go downward?

A. Yes.

Q. What did you infer as to her dress after the nightgown disappeared from view?

Mr. Kleinman: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection.

A. I would assume that she had no nightgown on at the time.

Q. All right.

And subsequent to that she went to bed; didn't she?

[fol. 780] A. Yes.

Q. What portion of the man's body did you see?

A. Upper portion of his body.

Q. And what was his state as far as attire was concerned?

A. Had no clothes on.

Q. What did you infer as to the lower portion of his body?

Q. As far as dress was concerned?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. I did not think about it.

Q. All right.

Now, did you infer that any sex act took place while she was lying on the bed?

Mr. Kleinman: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection.

A. Yes, I assumed that a sex act took place.

Q. What sex act was that, specifically?

A. He had a normal relation with her.

[fol. 781] Q. That was your inference?

A. Yes.

Q. All right.

Now, what social significance or message was there in the picture as the man removed the straps from the nightgown and her nightgown disappeared from view, Rabbi?

Mr. Kleinman: Objection, if the Court please.

(Conference held at this time among the three judge panel.)

Judge McDermott: Sustain the objection, and it is too narrow a question the Court feels, instead of being too broad a question.

Q. Rabbi, in your opinion, was the depiction—the portrayal of the detailed love making which led up to the act of intercourse—was that necessary to portray a social message?

Mr. Kleinman: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Mr. Osborne, just a moment, and don't answer, Rabbi.

[fol. 782] (Conference resumed at this time of the three judge panel.)

Judge McDermott: The question may be answered, Rabbi.

A. No, I don't think that it was necessary, and I preach social messages without pictures, too.

Q. And would you say, Rabbi, that the bathtub scene, the detailed picture of them in the state of dress or undress, was that necessary for the picture to preach a social message?

Mr. Kleinman: Objection, if the Court please.

Mr. Terrell: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. I don't think that you need any picture to preach any social message.

I don't think that pictures are an indispensable part for printing social messages, and textbooks do it, too.

Q. I am referring to these scenes, and they are not necessary to preach a social message?

A. I am no expert on movie making, and how important that is in presenting messages I do not know.

[fol. 783] Q. A social message could be preached without a detailed picture of them in the nude and passionate love making together?

Mr. Terrell: Objection, and dealing with the dominant theme of the entire picture, and you cannot pick out one scene at a time.

Mr. Osborne: That is all that you did on the State's side of the case.

Mr. Kleinman: This case—

Judge McDermott: Objection is sustained.

Q. Rabbi, it was offensive, was it not, in the movie the specific portrayal of detailed acts of passionate love making, wasn't it?

Mr. Terrell: Objection to that, if the Court please.

Judge McDermott: Overrule the objection.

A. No more offensive than most of the movies that I see.

Q. Then, you say that the movie, The Lovers, substantially was like most of the movies that you see, Rabbi?

A. In categorizing on that matter of sex, this is very [fol. 784] similar to current movies that are being shown all over.

Q. These pictures that you see portray persons in the nude in bed together. I am talking about these other movies that you say are comparable to The Lovers?

A. I am not quite sure that this isn't the first movie of that kind that I have seen.

Q. But you say that the motion picture, The Lovers, is substantially the same as movies that are being shown today?

Mr. Kleinman: Objection, if the Court please, and he said some of the movies and not all of the movies.

Judge McDermott: He may answer.

A. I would say that it is substantially the same as the current run of movie pictures where adultery or sexual difficulties, or marital difficulties are the theme of the movie, and I did not find it more offensive than these others.

Q. But the other movies with which you are comparing it now, did those other movies have detailed scenes and depictions of love play leading up to the sex act, such as shown in The Lovers?

A. Well, I am not really thinking of any specific movies in answering your question, but just giving my general [fol. 785] reaction that this movie did not outrage me to the extent that other movies done.

Q. But my question is, the other movies that you have mentioned as a basis for comparison, did those movies have detailed acts of love play and nudity and bedroom scenes leading up to the sexual intercourse act which you infer?

Mr. Kleinman: Objection, if the Court please.

(Conference held at this time of the three judge panel.)

Judge McDermott: He may answer the question.

A. A great many movies have such scenes.

Q. Would you name one?

A. No, and I told you that I would not have any movies in mind, but that is my general impression about that.

Q. Where did you see these movies that you use as a comparison?

A. Ordinary theaters.

Q. For instance?

A. Fairmont Theater that I patronize sometimes; Radio City, New York, which I go to occasionally, and those are some.

[fol. 786] Q. Now, at the Fairmont Theater, that is in University Heights in this county?

A. I think so.

Q. Do you recall the name of the film?

A. No, I don't recall the names of any specific films.

Q. Do you recall the male lead?

A. No.

Q. Do you recall the female lead?

A. No.

Q. Do you recall when you saw that picture?

Mr. Kleinman: If the Court please, objection, and he did not say "that picture".

Judge McDermott: He may answer.

A. I am not referring to any specific picture, but merely giving you my general impression of movies that I have seen in recent years, and wherever I may have seen them, and nothing struck me radically different about this movie than movies that I have seen.

Q. Do you recall when you saw the picture, or pictures, that you place in this category at the Fairmont Theater?

A. No.

Q. Do you recall what year it was?

[fol. 787] A. No.

Q. Do you recall with whom you went?

A. I generally go to the movies with my wife.

Q. I am speaking with reference to the picture, or pictures, that you classify in the same category as you class The Lovers?

A. I don't know with whom I went.

Q. What picture did you see, Rabbi, in Radio City, New York, that you put in the same class as the motion picture, The Lovers?

A. I am not a great movie goer generally, and I don't

know a great many, but I merely gave a cumulative impression of movies that I have seen, and I don't know them specifically.

Q. Do you recall the male lead, or the female lead, in the picture, or pictures, at Radio City that you place in the same category as the motion picture, The Lovers?

Mr. Kleinman: Objection, if the Court please.

Mr. Terrell: It is becoming redundant now, your Honor.

(Conference held at this time among the three judge panel.)

Judge McDermott: Court rules that the Rabbi may an-
[fol. 788] swer, and this is cross-examination, and the prosecutor has a right to pin that right down.

A. Will you repeat that question, and I have forgotten that?

Q. With reference to the movie, or movies, that you saw in Radio City, New York, that you place in the same category that you do the movie, "The Lovers," who were the male or female leads?

A. I don't remember.

Mr. Osborne: I have no further questions.

Judge McDermott: Anything else, gentlemen?

[fol. 789]

Redirect examination of Rabbi Armond Cohen.

By Mr. Terrell:

Q. Rabbi, when you saw The Lovers in New York and Cleveland, did you have any different reaction, one from the other?

A. No.

Q. The picture, in other words, made the same impression upon you in New York as it did in Cleveland, is that correct?

A. Yes, I think so, but I liked it better the second time, and I watched them more carefully, and I think that I was a little more sensitized to it by that time.

Q. And you still feel that the picture had social significance?

A. I do; yes.

Judge McDermott: Is that all, gentlemen?

Mr. Osborne: Yes.

Mr. Terrell: Thank you, Rabbi, very much for coming down.

Do you want to take a recess?

Judge McDermott: Yes, short recess.

(Recess.)

[fol. 790] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 792] Thereupon, the defendant, in order to further maintain the issues on his part to be maintained, called as a witness REVEREND PETER H. SAMSOM, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Reverend Peter H. Samsom.

By Mr. Terrell:

Q. Will you please state your name and address for the record?

A. Reverend Peter H. Samsom.

By Judge McMahon:

Q. Would you speak a little louder, please, and give your name to us again?

A. Reverend Peter H. Samsom.

Q. And how is your last name spelled for the record, please?

A. S-a-m-s-o-m.

By Mr. Terrell:

Q. Where do you reside, sir?

A. Rocky River.

Q. Business or occupation?

A. Minister of the West Shore Unitarian Church, Rocky

[fol. 793] River.

Q. Ordained minister in the state of Ohio?

A. Yes.

Q. How long have you been an ordained minister, Reverend Samsom?

A. Ordained for 21 years.

Q. How long have you been minister at the West Side Unitarian Church?

A. West Shore.

Q. I mean West Shore?

A. A little over four years.

Q. How long have you been a resident of Cleveland, Ohio, or Cuyahoga County?

A. Four years.

Mr. Stuplinski: I did not hear that last answer.

The Witness: Four years.

Judge McMahon: Just a moment, please. Thank you.

Q. Reverend Samsom, will you please give us a sketch of your background and your education, and what you did up until the time that you came to Cleveland to assume the position that you now hold?

A. I was born in the Netherlands, and educated in England and Australia, and I finished my college studies in [fol. 794] California.

Q. School?

A. University of California, Berkeley, California.

Q. Go ahead.

A. I acquired my professional training for the ministry in the Unitarian Seminary of Berkeley, California, and proceeded to a series of Unitarian ministeries in Southern California until coming to Cleveland in the year 1956.

Q. Since the time that you came here to Cleveland, Reverend Samsom, have you spoken to many people and met with many people in this community?

A. Yes, indeed I have.

Q. What are some of your outside activities and to whom have you lectured or attended seminars, and give us a little background?

A. I gave the baccalaureate address at the Rocky River High School last June, and have addressed a variety of

groups in various churches besides my own community, also various P.T.A. groups, and luncheon groups.

Q. Fraternal organizations?

A. Not very many of the latter.

I have given numerous addresses at memorial services particularly for people outside of my own congregations, [fol. 795] and thus have spoken to many people who are not limited to the membership of my own church. I have done that many, many times.

Q. As a result of the experience that you have had since you came to Cuyahoga County, would you have an opinion as to what the average person was or who the average person is in the community?

A. Well, the average person in the community would be—

Mr. Osborne: Objection, if the Court please.

Q. Give us an opinion, yes or no?

Judge M'Dermott: Overrule the objection.

The Witness: Was the objection to the question or my answer?

Q. Go ahead and answer.

A. The average person is a great many people, because we are a great heterogeneous community.

Q. Would you have an idea who the average person would be with normal sex instincts and what range he would fit in?

A. I think that I have an understanding of the average person's attitude on sex questions.

Q. Would you have an understanding as to what the [fol. 796] contemporary community standards are in our particular county?

A. Yes, I think so.

Q. Now, you have spent a good portion of your life in California, Berkeley, California, and that is a suburb of San Francisco?

A. We don't think so in Berkeley.

Q. In other words, it has been in that general area?

A. Part of the East Bay area.

Q. Would you say that the contemporary community

standard of San Francisco or Berkeley would be any different from Cuyahoga County?

Mr. Osborne: Objection.

A. My opinion is that they are the same.

Q. Would you have an opinion as to whether or not the average person in Cuyahoga County would be the same as the average person in San Francisco and the Berkeley area?

A. Essentially so; yes.

Q. Reverend Samsom, I keep wanting to make you a doctor.

A. I am a doctor.

Q. Dr. Samsom, did you see the picture called The Lovers?

[fol. 797] A. Yes, I did.

Q. Can you tell us, or, rather, do you have an opinion as to what the dominant theme of that picture was?

A. Yes, I have such an opinion.

Q. Can you please give us that opinion and tell us how you arrived at that opinion?

A. I arrived at the opinion by seeing the film alone and also in the company of my wife, whom I wanted to see that.

Mr. Osborne: Objection to the last part.

Judge McDermott: Let that stand in the record.

A. As a result of seeing the film twice, I arrived at an estimate of the dominant theme of the picture, The Lovers.

Q. Can you tell us what that theme is?

A. According to my understanding of this picture, it is a portrayal of a human relationship as it develops, beginning with the frustration and unhappiness of a stale and empty marriage progressing through a rather shallow affair into a kind of fulfillment with a person who gives this woman the affection and understanding that she is denied by the shallowness of her marriage.

[fol. 798] A. This, I think, is the dominant theme of the film, tracing of this human relationship in an adult and to my mind a very honest way.

Q. Dr. Samsom, as you viewed that picture, could you tell us whether or not that picture is offensive to the com-

munity standard as regards the average person dealing with his prurient interest?

Would this picture stimulate the average person's prurient interest?

A. I cannot see that it would in any way.

Q. Did it stimulate your prurient interest in any way?

A. In no way at all. It was very thought provoking.

Q. Can you tell us how you arrived at that conclusion, Dr. Samsom?

A. I arrived at that by seeing that twice.

Q. Did you arrive at that by talking to anybody about that picture?

A. I discussed that with my wife after we had seen that together.

Q. And after you had discussed that with your wife, was your position still the same?

A. My opinion was even stronger by noting what her reaction was.

Q. What was her reaction?

[fol. 799] Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection.

Q. In determining that this was a thought provoking subject, in your daily practice, doctor, do you deal with marriage counseling?

A. Yes, I do some marriage counseling, both before marriage and after marriage.

Q. As the problem is related in the picture, very similar problems that exist in the every day life today dealing with boredom that people may have and the tremendous power that love and affection displays—

Mr. Osborne: Objection, if the Court please.

(Conference held of the three judge panel at this time.)

Judge McDermott: You are asking for too many answers all at once.

Mr. Terrell: What is that question again, and give that to me, and we will take it in sections.

(Question read back.)

Q. Is there an actual problem that exists today where people become bored with the respective spouses, doctor? [fol. 800] A. Yes, indeed there is.

Q. And can you tell us whether or not you have encountered such problems in your marriage counseling service as a minister.

A. It is among the most frequent problems that I do encounter in the situations of strained marriages. Yes, indeed.

Q. And in your experience do you find, Dr. Samsom, that love and affection is a tremendous force that can overcome this particular social problem?

Mr. Osborne: Objection, if the Court please.

(Conference held at this time among the three judge panel.)

Judge McDermott: You may answer, doctor. In his official capacity he has a right to say.

Q. Court has ruled that you may answer the question, Dr. Samsom.

A. In my opinion, love and affection is the answer to staleness and boredom in marriage, if it is within the marriage.

Q. And did you find that love and affection here between herself and the archeologist was something that [fol. 801] was the direct result of the fact that she had been leading such a shallow life with her husband?

Mr. Osborne: Objection, and leading.

Judge McDermott: He may answer. Dr. Samsom, previously I had said in your official capacity, and I meant to say in your professional capacity.

The Witness: Thank you. I understand.

Q. You may answer that question, if you still have it.

A. Could I have the question again?

Mr. Terrell: John, will you please read that back?

(Question read back.)

A. Yes, I would say this was a direct result of the shallowness of her married life.

Q. Could you tell us whether or not this picture had any social significance?

A. Most strongly it did.

Q. Can you tell us what that social significance was, please?

A. Adult interpretation and analysis of the factors, at least one of the factors, that can militate against the [fol. 802] soundness of marriage and wholesome, healthy conduct of a marriage, and I would add that this was distinctly a moral picture in my judgment, because it portrayed the consequences as well as the strength of the attraction outside the marriage, and the conclusion was inescapable at the end of the film to my mind that the woman had paid and was going to pay an enormously heavy price for the indulgence that she had permitted herself to enter into with this man outside of her family, and she was becoming aware of this price as the film was closing, and to me this was the crowning significance of the film.

Q. You feel that this picture was produced as dirt for dirt's sake?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overruled, and you mentioned that in your opening statement.

A. This has no place in my estimation of the film, and it had no dirt for dirt's sake.

Q. Do you have an opinion about whether or not this picture was produced for the purpose of exciting the prurient interest of the average person dealing with the contemporary community standard, Dr. Samsom?

[fol. 803] A. No, it did not excite any such interest in my opinion.

Q. Did not excite any prurient interest in you, Dr. Samsom?

A. No, and I am a normal human being, I can assure you.

Mr. Terrell: You may take this witness.

[fol. 804]

Cross examination of Reverend Peter H. Samsom.

By Mr. Osborne:

Q. Do you recall, doctor, seeing the bathtub scene?

A. Yes, sir.

Q. Was that scene necessary to make the film socially significant?

Mr. Terrell: Objection, if the Court please, and it is part of the picture.

(Conference held at this time among the three judge panel.)

Judge McDermott: Overrule the objection.

Mr. Terrell: I will withdraw the objection.

Judge Pincura: Withdrawal is late, and the Court has already ruled on that.

The Witness: Shall I answer that?

Judge McMahon: Do you have the question?

The Witness: May I have that again, please?

Q. Was the bathtub scene necessary to make this film [fol. 805] socially significant?

A. The author and producer of the film judged it to be so necessary, and I took it as part of the integrity and unity of the film, and the gradual building up and culmination of a human relationship.

Q. And you would say that it was necessary to make the film socially significant?

A. Not being an artist, I am in no position to say yes or no, but I can only say that it was necessary in the form or on the—well—I used that as part of the unity of the film.

Q. I am asking you about your independent judgment, doctor.

Do you have an opinion about whether or not the bathtub scene was necessary to make the film socially significant?

Judge McDermott: What do you say, doctor?

Judge McMahon: Do you have an answer?

The Witness: I have no answer in addition to what I have already said, your Honor.

Q. All right.

Do you recall the passionate lovemaking in the bedroom [fol. 806] scene, before the man and the woman took their positions upon the bed?

Do you recall that?

Mr. Kleinman: Objection to the use of the word passionate.

Mr. Osborne: I will withdraw that.

Was there passionate lovemaking between the man and the wife before they took their positions upon the bed?

The Witness: Yes, I would infer that there was.

Q. Now, was the depiction of that, the portrayal of that, necessary to make this film socially significant?

A. I think that it was the natural culmination of everything that had gone before; and, therefore, was an integral part of the film.

Q. My question is, was it necessary to make the film socially significant?

A. Artistically necessary, yes.

This is the only way that I can judge this since the author and producer judged it necessary to the unity and comprehension of the whole film.

Q. Doctor, I am asking your independent judgment, and [fol. 807] not what you consider to be the judgment of the author or the producer, and I ask—

Mr. Kleinman: I object, if the Court please.

Q. I ask you whether or not that passionate lovemaking was necessary to make the film socially significant?

Mr. Terrell: I object, and he is asking him to be author and director of that picture.

(Conference held of the three judge panel.)

A. I would answer that—

Mr. Kleinman: Wait a minute, and wait for a ruling.

The Witness: Excuse me. I am sorry.

Judge McDermott: If you have an opinion, you may say, yes or no.

The Witness: Only yes or no.

Judge McDermott: Enlarge upon that.

Judge McMahon: Is that your answer, yes or no?

Judge McDermott: Answer that in your own way.

[fol. 808] The Witness: I must answer by saying that I cannot dissect this film into segments without doing violence to the thought experience that the film represented to me, and I cannot isolate one scene from the others and make any relevant statement as to whether it was necessary.

Q. In other words, doctor, there would not be the film, "The Lovers," unless it had a bedroom scene; would there?

Mr. Kleinman: Objection.

Judge McDermott: Sustain the objection.

Mr. Kleinman: Exactly; he didn't say.

Judge McDermott: Sustain the objection.

Q. Now, what sex act, if any, took place between the man and the woman in this picture?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. I saw no sex act take place.

[fol. 809] Q. Did you infer that any sex act took place, doctor?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. This is a matter of a person's private judgment, I believe.

Q. I say, did you infer that any sex act took place?

A. I inferred that the woman reached a climax.

Q. And was that a physical climax, or an orgasm, doctor?

A. That is what I was referring to, yes.

Q. All right.

And did you infer that the man had anything to do with the orgasm?

A. Well, naturally.

Q. You did?

A. Yes.

Q. Now, to make this film socially significant, was it

necessary that the woman be depicted as reacting to an orgasm?

A. The same answer holds true, I shall say.

Q. Will you tell us your answer now?

[fol. 810] A. This was an integral part of the unity of the film, and the culmination of the frustration and the unhappiness and seeking that had gone on in the earlier part of the picture, and this was the culmination, and was the inherent part of the artistic intention of the author.

Q. I see.

Of course, you don't know the author personally, do you, doctor?

A. No, and I can only judge his intent by his production.

Q. I see.

I did not ask you about his intention, or did I ask you?

A. No, but I cannot answer the question without referring to his intention.

Q. Would you say that this is true, doctor:

Since you say the matter involving the orgasm is an integral part in the picture, if you took that part out, you wouldn't have the same picture, would you, that you had with it in?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: The doctor may answer.

[fol. 811] Mr. Terrell: May we have the question again, please, as I lost the thought.

Mr. Osborne: John, would you repeat that?

(Question read back.)

A. Well, it would be a couple of minutes shorter.

Q. Well, doctor, would anything be lost of social significance of the picture if the part involving the reaction to the orgasm were removed?

Mr. Terrell: Objection to that, if the Court please.

Judge McDermott: Overrule the objection.

A. I cannot answer that because I cannot chop this film into pieces.

Q. All right.

Now, doctor, would the picture be as socially significant

if the part involving the couple being in the bathtub were removed?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. I will give the same answer, that I cannot cut this picture into pieces, and this does violence to its integrity.

[fol. 812] Q. You say that it has integrity?

A. Yes.

Q. You say that this is a moral picture?

A. Yes.

Q. Word "moral" is a completely neutral thing, isn't it?

A. In the way that I use it, it has a positive meaning, and teaches a moral lesson.

Q. But there are things that are morally good and things that are morally bad?

Mr. Terrell: Objection, and this is argumentative.

Judge McDermott: Objection is overruled.

A. I think that the context of what I said makes it obvious what I said, and my intention is that this is a film that teaches a wholesome moral lesson.

Q. Then, your statement that this teaches a moral lesson is neutral?

A. No, because I intended that it be a positive statement that this is a moral wholesome picture.

Q. All right.

You will recall the scene, the boat scene, where passionate lovemaking took place?

[fol. 813] Mr. Kleinman: Objection, and no passionate love there.

(Conference of the three judge panel held at this time.)

Mr. Osborne: I will withdraw that.

Q. Was there passionate lovemaking in the boat, doctor?

A. I don't know, and it wasn't explicitly portrayed, whatever took place.

Q. You saw the couple lying side by side, did you not?

A. Yes.

Q. You saw him put his arms about her, did you not, doctor?

A. Yes.

Q. You saw him raise himself up and get close to her, did you not?

A. I think so.

Q. You saw him place his pubic area against her body, did you not?

A. No.

Q. You did not?

A. I did not see that.

Q. And you say that the lovemaking in the boat wasn't [fol. 814] passionate?

A. I don't know whether it was or not.

Q. Now, that boat scene, whether it was passionate or not, was that necessary to make the movie socially significant?

A. It was a part of the unity and development of the mood that was consistent throughout the film, and I cannot take that out and analyze that by itself and see if it was necessary or not.

Q. All right.

Now, you saw the scene after they awoke in the morning, and he was wearing a bathrobe of some sort, long garb like a housecoat, did you not?

A. Yes.

Q. You saw then the two come together, and he opened his robe, and she entered within the confines of his robe, and he closed that about her, did he not, doctor?

A. Yes.

Q. Was it necessary that scene be in there to make the film socially significant?

A. Well, if you have to have the answer again, it is the same as it was to the other attempt to chop this film into segments, and I cannot do that without violating its wholeness to me.

[fol. 815] Q. Then, you cannot answer that question?

Mr. Terrell: I object, if the Court please.

He has answered that question.

Judge McDermott: Let that answer stand, and he has answered that.

Q. When you speak of the effect upon the average person, doctor, will you tell us what is the average person?

A. There are many average persons. As I indicated in answer to previous question by Mr. Terrell, the American community consists of a wide variety of different communities, welded successfully into a Democracy, and the average varies from place to place in this detail and in that detail.

Q. Well, I am asking you with reference to Cuyahoga County, what is the average person?

A. Even Cuyahoga County is a multiplicity of heterogeneous communities, and there are many kinds of average persons in the community.

Q. Will you give us a definition of an average person?

Mr. Kleinman: Objection, unless the doctor knows and can do it.

Judge McDermott: Can you do it, doctor?

[fol. 816] The Witness: I cannot do it. No, I can't.

Judge McDermott: He has answered.

Q. Would you say that the dominant theme of the film involves sex?

A. As a normal part of human life, yes.

Q. Well, is the dominant theme of the film sex, doctor?

A. No.

Q. All right.

A. In my judgment.

Q. Well, we are asking your judgment.

Mr. Osborne: No further questions.

Judge McDermott: Mr. Terrell, anything further?

Mr. Terrell: No further questions.

Thank you very much, doctor, for coming down.

Mr. Osborne: Thank you.

Judge McDermott: It was a pleasure to have you, doctor.

The Witness: Thank you.

* * * * * * *

[fol. 820] Thereupon, the defendant, in order to maintain the issues on his part to be maintained, called as a witness EDWARD SCHUMAN, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Edward Schuman.

By Mr. Kleinman:

Q. Will you state your name, please?
A. Edward Schuman.
Q. Where do you live, Mr. Schuman?

By Judge McMahon:

Q. First name, sir?
A. Edward.

By Mr. Kleinman:

Q. Where do you live?
A. 1287 Lincoln Avenue, Highland Park, Illinois.
Q. Will you state what your occupation is?
A. I am Vice-President and General Manager of the Art Theater Guild.
Q. Does the Art Theater Guild have anything to do with the Heights Art Theater?
A. Yes, Heights Art Theater is one of the theaters oper-
[fol. 821] ated by the Art Theater Guild.
Q. Will you state how many theaters are operated by the Art Theater Guild?
A. 15.
Q. Would you state in what cities these theaters are?
A. Cleveland Heights; East Cleveland; Akron, Ohio; Champaign, Illinois; Dayton, Ohio; Columbus, Ohio; Louisville, Kentucky; Denver, Colorado; Kansas City, Missouri; Toledo, Ohio; Memphis, Tennessee; Yellow Springs, Ohio, and Detroit, Michigan.
Q. I did not count them.
Will you state specifically what your duties are as Vice-President and General Manager of the Art Theater Guild?
A. Together with my associate, Mr. Louis Sher of Colum-

bus, Ohio, we supervise the fifteen theaters with the primary duty of the selection of the films.

Q. Now, would you state to the Court some of the background, some of your own background insofar as the motion picture industry is concerned, and I withdraw the question.

What has been your education, Mr. Schuman?

A. In addition to high school education, I attended the University of Michigan and received my Bachelor of Arts [fol. 822] degree and Masters of Arts degree.

Q. Have you had any other studies aside from your studies at the University of Michigan?

A. Nothing significant.

Q. Before you became Vice-President and General Manager of the Art Theater Guild, what did you do?

A. One thing I did was operate another theater which eventually became part of this group, in Detroit, Michigan, and I was concert manager of classical concerts, and I did some management of plays for a live theater in addition to music fields, and primarily before that I was a mathematician.

Q. Will you state, during the course of your present employment how many motion picture films do you see in a year?

A. Well, I would say approximately 100.

Q. As Vice-President and General Manager of the Art Theater Guild, did you see the motion picture film, The Lovers?

A. Yes.

Q. When did you first see that film?

A. Approximately August, 1959.

Q. Where did you see the film?

A. New York City screening room, and these are prescreenings given for persons and people in the industry. [fol. 823] Q. Do you know whether that screening was before or after that screening was viewed by the censor board?

A. I believe that it was after it was viewed by the New York Board of Censors.

Q. Do you know whether this film was viewed by the Bureau of Customs?

A. I know that it has been.

Q. And do you know whether or not the Bureau of Customs ruled on the question of whether or not the film was obscene?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: If you know, but the question is really objectionable in view of the law of this state, but you may answer.

A. Yes, I know that it was ruled as acceptable by the Customs authorities.

Q. Now, with reference to the booking of the film, when did you, if you did, book the film, The Lovers, to be shown at the Heights Art Theater in Cleveland Heights?

[fol. 824] A. Shortly after that screening in August of 1959.

Q. Will you describe briefly the Heights Art Theaters and its method of operation?

A. Well, the Heights Art Theater, like all of the other theaters we have in the chain, shows primarily foreign films, and some unusual Hollywood made films, catering to a more sophisticated adult audience, and shows no matinees, and does not have any children in the audience, except on certain films when accompanied by their parents, and does not sell popcorn or cater to juvenile or teenagers, and is operated more like the Play House than the average movie theater.

It has unusual decor, and decorated more like a lounge, without any advertising in the lobby, and serve coffee, and we have a sitting room and a smoking lounge.

Q. Now, aside from the Heights Art Theater in Cleveland, did you book the motion picture film, The Lovers, in any other theaters in the State of Ohio, Mr. Schuman?

A. Yes.

Q. What theaters were they?

A. Toledo, Ohio; Columbus, Ohio; and Dayton, Ohio. I think those were the only ones.

[fol. 825] Q. You mentioned Yellow Springs.

A. We haven't played that there yet but intend to play it there in the—

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Yes, strike out the latter part about what he intends to do.

Q. Up until the time that this film was shown in the Heights Art Theater had any action been taken by any authorities in the State of Ohio to close down any theater or to make arrests in connection with the showing of the film, The Lovers?

A. No, there was no such action.

Q. And when did the film, if you can tell, open in these various cities?

A. They were all approximately at the same time. Several cities preceded the opening in the Cleveland Heights Art Theater, and several were a few days later.

Q. Aside from the State of Ohio, did you exhibit this film in any other theaters around the country, Mr. Schuman?

A. Yes.

Q. Will you state in what other theaters you exhibited [fol. 826] this film?

A. Louisville, Kentucky; Denver, Colorado; Kansas City, Missouri; Champaign, Illinois; Memphis, Tennessee; and that is about it.

Q. Do you know whether or not the film was viewed there by any of the authorities prior to the showing of this film?

Mr. Osborne: Unless he knows of his own knowledge, we will object, and it would be predicated upon hearsay.

(Conference of the three judge panel held at this time.)

Mr. Kleinman: I will withdraw that.

Judge McDermott: Sustain the objection.

Q. Do you know whether the film was shown to the authorities prior to exhibition in any of these various cities?

A. Yes.

Q. Was it shown?

A. Yes.

Q. And what particular authorities?

A. Censor Board of the city of Memphis saw the film.
[fol. 827] Q. And in the other cities?
A. There are no censor boards in the other cities that I mentioned.
Q. Did the police department in any of the other cities request permission to see the film?

Mr. Osborne: Objection, if the Court please.
The Witness: No, they did not request permission.
Judge McDermott: Sustain the objection, and strike out the answer, and the Court will disregard that.

Q. Now, with reference to the films that you have shown at Heights Art Theater, have you had anything to do with booking of these films at the Heights Art Theater prior to this time?
A. Yes.
Q. And for how long have you been booking films into the Heights Art Theater?
A. Since the theater was organized by us back in 1954.
Q. Before the film was exhibited at the Heights Art Theater, do you know whether anyone connected with the Heights Art Theater, including yourself, received any notification from any authorities relative to the showing of
[fol. 828] this film?

Mr. Osborne: Objection, if the Court please.

(Conference held at this time of the three judge panel.)

By Judge McDermott:

Q. Do you know, Mr. Schuman?
A. Yes.
Q. Answer that.
A. Will you please repeat this for me?

Mr. Kleinman: Will you read it, please?

(Read back.)

A. Yes, I know that we did not receive any such notification.

By Mr. Kleinman:

Q. You stated, Mr. Schuman, that you have seen in the neighborhood of 100 films a year?

A. Yes.

Q. During the past five or six years?

A. During the past nine years that I have been in this business.

Q. In connection with your duties, have you had occasion to travel to these various communities that you have spoken about?

[fol. 829] A. Yes, I travel regularly to them.

Q. Have you discussed films in general, or this film in particular, with people with whom you have come in contact with during your recent travels?

A. Yes.

Q. In connection with your activities, do you find that the community standards of the cities that you have mentioned differ from that of the city of Cleveland?

A. I would say that they are substantially the same.

Q. Mr. Schuman, would you state what in your professional opinion is the dominant theme of the motion picture film, The Lovers?

A. Well, in my opinion the dominant theme relates to the emotional feeling of the wife, and her looking for satisfaction and happiness in her own relationship with other people, primarily her husband.

Q. And in your opinion does this theme appeal to the prurient interest of the average person, based upon contemporary community standards as you have observed them in connection with your employment?

A. No, I do not think so.

Q. Now, you have stated that the motion picture film, The Lovers?

A. Yes, I feel that there is social significance in the film.

[fol. 830] Q. Could you elaborate as to your opinion, Mr. Schuman?

A. Well, it is a story of a wife who has an unhappy marriage with a problem of neglect and distrust on the part of her husband, and I think the social significance is this marital problem between the husband and wife and the pos-

sible unhappy results of such a situation as portrayed in the film.

Q. Now, you haves tated that the motion picture film, The Lovers, was showing in Toledo?

A. Yes.

Q. Is that the same version of the film that was shown at the Heights Art Theater?

A. Yes.

Q. Was it shown in Columbus, Ohio?

A. Yes.

Q. Same version of the film?

A. Yes, it was.

Q. Do you know whether the film shown in Cleveland Heights is the same version as that shown in New York City?

A. No, there is a difference.

Q. Could you tell approximately how much difference that is in length of time? How much was cut out of the film in [fol. 831] New York?

A. I think approximately 30 to 40 seconds.

Q. Having viewed a good number of films during the course of your experience, do you have an opinion about the artistic value of the film, The Lovers?

A. Yes.

Q. Will you state what is your opinion about its artistic value?

A. I think it is a very beautifully made film, and I think it is well acted, and has a valuable story, and I don't think that it is the best film of the year that we have shown at our theaters, and it at least rates along with the average that we show, and most of the films that we have are very selectively taken by us.

Q. Do you have an opinion about the quality of the photography?

A. Yes.

Q. What is your opinion?

A. I think the quality of the photography is excellent.

Q. Are you familiar personally with any of the personalities involved in the production, directing, or acting of the picture, The Lovers?

A. I know them only by reputation.

[fol. 832] Q. And so far as their reputations are concerned, what do you know about their reputations professionally, Mr. Schuman?

A. Jeanne Moreau, the female star, is today considered the leading actress in France, and has made various other films.

Louis Malle, the producer and director, is considered one of the best of the young directors and producers in France today, and has received considerable acclaim throughout France, and has worked on many films and has developed a great reputation.

Q. Do you know whether this film has received any awards in this field?

A. Yes.

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

Q. You may answer.

A. Yes, I know that it has.

Q. Will you state what awards those were, Mr. Schuman?

A. Received an award at the Venice Film Festival, but I don't recall the name of the award—and I think called the Golden Palm, and I think it received the second prize.

[fol. 833] Q. Do you know any other awards that it has won, Mr. Schuman?

A. No, I do not.

Q. Do you know whether it has been chosen by any movie critic as an outstanding film?

A. I am familiar with all the reviews of our film, and it was chosen by the critic of the New York Times as one of the ten best films of the year.

Q. Do you know any other honors that the film may have received?

A. No, other than the reviews given to it by critics about the country.

Q. So far as you are concerned as Vice-President and General Manager of the Heights Art Theater, was this film, The Lovers, shown with the intent to appeal to the prurient interest of an average person attending the Heights Art Theater?

A. Definitely was not.

Judge McDermott: Any further questions?
Mr. Kleinman: I have no further questions.

[fol. 835]

Cross examination of Mr. Edward Schuman.

By Mr. Osborne:

Q. Mr. Schuman, what organization are you connected with?
A. Art Theater Guild.
Q. And is that a corporation?
A. Yes, it is.
Q. Where is that incorporated?
A. The State of Ohio.
Q. What is your position with the corporation, Mr. Schuman?
A. Vice-President and General Manager.
Q. And do you own stock in the corporation, Mr. Schuman?
A. Yes, I do.
Q. Now, how much stock, if I may ask?

Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: As to his motive, he is testifying, [fol. 836] and overrule the objection.

Q. How much stock?
A. About 20 per cent.
Q. All right.
Who owns the balance of the stock in general, Mr. Schuman?

Mr. Kleinman: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Court has a right to know, and has to do with motive or intent of this witness. Objection is overruled.

Q. Who owns the balance?

A. Number of people own that stock.

Q. Is there anyone in this courtroom that owns stock?

A. My associate, Louis Sher, of Columbus, Ohio, owns some stock.

Q. Is he in the courtroom?

A. Yes.

Q. Where is he?

A. There he is.

Q. What is his name?

A. Louis Sher.

[fol. 837] Q. Now, Mr. Schuman, in dollars and cents, what is the market value of your 20 per cent of the shares of stock?

Mr. Terrell: I think that is objectionable.

Judge McDermott: Overrule the objection on the same theory now.

Q. Will you answer the question?

A. It isn't a marketable security, and it is impossible to answer that question.

Q. And what value is placed on the corporation books as far as 20 per cent of the shares of stock is concerned?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection on the same theory.

Q. Will you answer the question?

A. May I have that again?

Mr. Osborne: Will you read that to him, Mr. Sato?

(Question read back.)

A. I think about $500.00.

Q. You are on salary?

A. Yes.

[fol. 838] Q. And you have an expense account?

A. My traveling expenses.

Q. What is your per annum salary?

Mr. Kleinman: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection on the same theory.

Q. Will you answer the question?

A. Approximately $12,000.00.

Q. Now, you live in Highland Park, Illinois, Mr. Schuman?

A. That is right.

Q. Was this movie shown in Chicago, Illinois, Mr. Schuman?

A. No, it was not.

Q. Was there an attempt to show it in Chicago, Mr. Schuman?

Mr. Terrell: Objection, and that would be hearsay.

Judge McDermott: Overrule the objection.

A. I don't know if an attempt was made to show that.

[fol. 839] Q. Is there motion picture censorship in the city of Chicago, Illinois?

Mr. Kleinman: Objection, if the Court please.

By Judge McDermott:

Q. Do you know?

A. I don't operate any theaters in the city of Chicago, and I am not an authority on the city of Chicago.

By Judge McMahon:

Q. The question is, does censorship exist in the city of Chicago?

A. I know that there is a censor board in the city of Chicago.

Q. And the answer is yes?

A. Yes.

By Mr. Osborne:

Q. You don't know whether or not it was presented to the censor board in Chicago?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

If you know.

Q. Was it presented to the censor board?

[fol. 840] A. I can tell you that I read that in the newspapers, but I don't know from first hand information.

Mr. Terrell: I ask that the answer go out.

Mr. Osborne: We will accept that answer.

He has testified about Louis Malle, and he never met Louis Malle.

Judge McMahon: One minute, please.

(Conference of the three judge panel held at this time.)

Judge McDermott: In view of his position with the company, the Court feels that he should be pinned down, and he either knows or doesn't know from his personal knowledge, and pin him down.

Q. Does your organization operate any theaters in Chicago?

A. No, we do not.

Q. I see.

You are acquainted with the theaters in Chicago, Illinois?

A. I am acquainted with some of the theaters in Chicago; yes.

[fol. 841] Q. Now, was this film ever shown in Dayton, Ohio, Mr. Schuman?

A. Yes, it was.

Q. When was it shown in Dayton?

A. I think shortly after we opened here.

Q. Under what circumstances did the showing terminate?

Mr. Kleinman: Objection, if the Court please.

Mr. Osborne: May I be heard, your Honor?

(Conference held at this time of the three judge panel.)

Judge McDermott: In view of the direct examination and the type of questions asked, the Court feels that you are entitled to know.

Mr. Kleinman: This is after the time—after the date of the indictment, if the Court please.

Judge McDermott: That doesn't make any difference.

Q. Under what circumstances was the Dayton showing terminated?

A. Terminated by the police department of Dayton, Ohio.

[fol. 842] Q. And state whether or not any court action resulted from that?

Mr. Terrell: Objection, if the Court please.

(Conference held at this time of the three judge panel.)

By Judge McDermott:

Q. Do you have personal knowledge if there was court action in the city of Dayton?

A. Yes, I do.

Judge McDermott: Go ahead, Mr. Prosecutor.

By Mr. Osborne:

Q. Was there court action?

A. Yes.

Q. And you testified in that court action, didn't you?

A. Yes.

Q. And that case concerned a man by the name of Warth?

A. Yes.

Q. Who is Mr. Warth?

A. Manager of our Dayton theater.

Q. All right.

[fol. 843] Q. Has the picture been shown in Dayton since it was closed down by the police?

A. No, it hasn't.

Mr. Kleinman: Objection.

Judge McDermott: Overrule the objection.

Q. Now, are the community standards of Dayton essentially any different from the community standards of Cleveland or Cuyahoga County?

Mr. Kleinman: If he knows.

By Judge McDermott:

Q. Can you answer that, Mr. Schuman?

A. That is, my opinion?

Q. State what that is.

A. They are not different.

By Mr. Osborne:

Q. Are you acquainted with community standards in Chicago?

A. I don't live in the city of Chicago.

Q. I say, are you acquainted with the community standards in Chicago?

A. I don't think so. I don't live in the city of Chicago.

Q. Do you live in Cleveland?

A. I have lived in Cleveland.

[fol. 844] Q. And when was the last time that you lived here, Mr. Schuman?

A. About two and one-half years ago.

Q. And you can't tell us if the community standards in Cuyahoga County are essentially different from those in Chicago?

A. I am not familiar with those in Chicago.

Q. Will you answer the question?

A. No.

By Judge McDermott:

Q. Do you know what he means by community standards?

A. Yes, I think that I do.

Q. All right.

By Mr. Osborne:

Q. Do you have any theaters in the State of Maryland?

A. No, we do not.

Q. To your knowledge, has the film been shown anywhere in the State of Maryland?

A. I am not familiar.

Q. Do you have any theaters in the State of Virginia?

A. No.

Q. Are you familiar with the fact as to whether or not [fol. 845] this film was shown in Virginia?

A. I am not familiar.

Q. How long does it take for 141 feet of film to pass through a projection machine?

A. I don't think that I know.

Q. All right.

Now, you say that in New York there is censorship, is that right, motion picture censorship by law? Is that right?

Judge McMahon: New York City?

Mr. Osborne: State of New York and New York City.

A. State of New York has a censor board.

Q. That comprehends New York City, does it not, Mr. Schuman?

A. Yes.

Q. And only a censored version of this film is shown in the State of New York?

A. That is right.

Q. Now, who is Nico Jacobellis?

A. Manager of the Heights Art Theater.

Q. How long has he been manager of the Heights Art Theater?

A. Approximately three and one-half to four years.

[fol. 846] Q. Is he in charge of that theater?

A. Yes, he is.

Q. Was he in charge on November 13th of last year, Mr. Schuman?

A. Yes, he was.

Q. When was this film shown first in any of your art theaters?

A. I believe a week before the date that you mentioned in the Heights Art Theater.

Q. How many copies of the film did you have for your art theaters?

A. Probably five or six.

Q. Was this film presented to the motion picture association in Hollywood for the code seal of approval, if you know?

A. I do not know.

Q. Do you submit any of your pictures to the motion picture association for the code seal of approval, Mr. Schuman?

A. We are exhibitors, and we have nothing to do with the production of the film.

Q. But the motion picture industry itself has regulations in the form of issuance or non-issuance of the code seal of approval?

A. I am not familiar with that.

[fol. 847] Q. You mean to say that you don't deal with foreign films?

A. I did not say that.

Q. It is a fact, sir, that any foreign film producer may present their motion picture films to the association to see whether or not it will receive the code seal of approval?

Mr. Terrell: Objection, and that is argumentative.

Judge McMahon: Just a moment now, please.

A. I don't know.

Judge McDermott: His answer is he doesn't know, and that is it.

Now, gentlemen, let us be orderly and you have been behaving yourselves right well until now.

Q. Now, at the Cleveland Heights Art Theater Mr. Jacobellis was the responsible head of the theater; wasn't he?

Mr. Terrell: Objection, and he has already testified to that, your Honor.

Judge McDermott: Overrule the objection.

[fol. 848] Q. There was no one over him in Cleveland Heights, was there?

A. Not in Cleveland Heights.

Q. And he was responsible for the operations of the theater?

A. In Cleveland Heights.

Q. That is what I am asking, sir!

A. Yes.

Q. He was in charge of the operations of that theater; was he not?

A. Yes, that is right.

Q. And under his direction there was a projectionist, wasn't there?

A. That is true.

Q. Motion picture projectionist, isn't that right?
A. That is right.

Judge McDermott: Anything else now?

Q. Now, it is your intention to show this picture where in the State of Ohio?

Mr. Kleinman: Objection, if the Court please.
Mr. Osborne: He has testified to that before.
[fol. 849] Mr. Kleinman: The Court asked that it be stricken before.
Mr. Osborne: That is right; all right.
Judge McDermott: Yes, we did strike that before.
Mr. Osborne: I will withdraw that.

Q. Would you say that the dominant theme of this film involves sex?
A. No, I would not.
Q. Does sex play any part in the dominant theme of this picture?
A. Plays a part in the picture, but not in the dominant theme.
Q. Not in the dominant theme?
A. No.
Q. What is the dominant theme?
A. I think the dominant theme is the relationship between the husband and wife.
Q. That is it? That is the dominant theme of this film?
A. Dominant theme involves the relationship of the husband and wife.
Q. Well, the relationship of husband and wife considers [fol. 850] the theme of sex, doesn't it?
A. In this picture it did not.
Q. It did not involve sex?

Mr. Terrell: Between the husband and wife.
Mr. Osborne: Let him testify.
Judge McMahon: Just a moment, please.
He said that in this picture it did not.

Q. It did not include sex?
A. No.

Q. Why did the woman take up with this man that she picked up on the road?

A. I think the woman's motivation was based upon unhappiness in her married life.

Q. What was the root of the unhappiness, Mr. Schuman?

A. A poor relationship between husband and wife on all levels.

Q. Did that include sex?

A. I don't know, and that wasn't specific.

Q. You don't know?

A. No.

Q. How many times did you see the picture?

A. Twice.

[fol. 851] Q. What happened between the man and woman in the wife's bedroom?

A. Between which man and which woman?

Q. Between the archeologist and this woman, Jeanne Moreau?

A. They had sex relations.

Q. Well, there was sex involved in the bedroom, was there?

A. Yes.

Q. What happened between the two of them in the bathtub?

A. Well, from what I saw in the film, they were both in the bathtub, and that is all that I saw in the bathtub.

Q. In what state of undress or dress?

A. State of undress.

Q. Did that involve sex, a man and woman naked in the bathtub together?

A. I did not see sexual intercourse.

Q. I did not ask you about sexual intercourse, but did it involve sex?

A. How do you define sex?

Q. You don't know what sex means?

Mr. Terrell: I object, if the Court please.

[fol. 852] A. I assume that you mean sexual intercourse.

Q. S-e-x. Sex. Were there any sexual overtones or undertones as far as the bathroom scene was concerned, Mr. Schuman?

Mr. Kleinman: Objection.
Judge McDermott: Objection is overruled.
Mr. Kleinman: Withdraw the objection.

A. No.
Q. Did you infer any sexual overtones or undertones?
A. In what scene?
Q. Bathtub.
A. I did not infer sexual intercourse in that scene.
Q. You mean to say that there was no sex involved with the man and the woman naked together in the bathtub?
A. Are you defining sex as sexual relationship? Is that it?
Q. S-e-x!

Mr. Terrell: I object, and two different meanings.

A. In the scene that I saw there was no sex in the bath-
[fol. 853] tub.
Q. Well, he was a man?
A. Yes.
Q. And she was a woman?
A. Yes.
Q. Why were they in the bathtub together, Mr. Schuman?
A. I presume that she went to get a bath.
Q. Why did he get in?
A. Went in for the same purpose.
Q. And were there any sexual overtones or undertones in the boat scene?
A. There were preliminary sexual stimulation; yes.
Q. Preliminary to what?
A. Preliminary to social intercourse, which I testified occurred in the bedroom.
Q. Well, then, the scenes involving sex culminating in sexual intercourse started with the boat scene; is that right?
A. I think so.
Q. All right.
And you say that the dominant theme did not involve sex?
A. Dominant theme did not; no.
[fol. 854] Q. If you took sex out of the film, would you have that movie?

Mr. Kleinman: Objection, if the Court please.

(Conference held at this time of the three judge panel.)

Judge McDermott: Overrule the objection.

Q. I am asking—

A. What do you mean, by taking sex out of the film?

Q. If you took the overtones and undertones of sex out of that film, would you have a movie?

Mr. Terrell: I object, and riding on a horse is sex, and everything else, and I think we are far afield.

Mr. Osborne: I am not going to buy that.

Mr. Terrell: Sex is everything, man and woman, and I don't think that it is proper.

Judge Pincura: Objection is noted, and we will rule on the objection, gentlemen.

(Conference held at this time of the three judge panel.)

[fol. 855] Judge McDermott: Overrule the objection.

Mr. Terrell: Save my exception, if the Court please.

Judge McMahon: Yes.

Judge McDermott: Answer the question, please.

The Witness: Would you repeat the question, please?

Mr. Osborne: Would you read that question, please?

(Question read back.)

A. I believe the deletion of any significant part of the film would alter the entire dominant theme of that film.

Q. I am asking specifically about the overtone and the undertones of sex?

A. I believe that my answer included that.

Q. Your answer is in the affirmative?

A. I think that I have answered the question.

Q. I am not asking you that.

Judge McDermott: He said that any serious deletion of the film would alter or damage the theme of the film.

[fol. 856] Q. If you took out the bedroom scene, would that be a serious deletion?

A. Let me answer this way:

We did not produce this film, and we did not delete that, and we are exhibitors, and we did not produce this film.

Q. Now, my question is:

If you took out the bedroom scene, would it be a serious deletion?

By Judge McDermott:

Q. Yes or no?

A. Yes.

By Mr. Osborne:

Q. If you took out the boat scene, would it be a serious deletion?

A. Yes.

Q. If you took out the scene in the bathroom, would that be a serious deletion?

A. Yes, I don't believe that it would be.

Mr. Osborne: I move to strike that.

Judge McDermott: Yes, strike that, strike that answer and not called for.

Q. You say that this film rates with the average of the films that you show at the Heights Art Theater?

[fol. 857] A. Yes, I think that it does.

Q. Then, you wouldn't rank it with one of the ten best foreign films of the year?

A. We only show about ten foreign films a year.

Q. But my question is that you would not rate it with one of the ten best foreign films?

A. Yes, I would.

Q. But it was just average, and you said that it was average in regard to what you saw?

A. In regard to what we saw; yes.

Q. You say that you are familiar with the reviews of this film in the leading publications.

Are you acquainted with the review by Henry Hart of New York, editor of Films in Review?

A. I am not familiar with Henry Hart nor his review.

Q. I will ask, sir, whether or not you agree with this,

and I call to your judgment State's Exhibit 5, and specifically State's Exhibits 5-A and 5-B. Are you in agreement with this:

The script of The Lovers is an unabashed attempt to lead up to one scene, and which the camera records at length, the facial reactions of a woman during cunnilingus.

Are you in agreement with that?

[fol. 858] A. No, I am not.

Q. Well, was there cunnilingus in the film, Mr. Schuman?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

Q. Was there?

A. I did not see it.

Q. Did you infer cunnilingus?

A. No, I did not.

Q. Do you agree with this statement in State's Exhibit 5-B:

At a beautiful estate outside Dijon the film, The Lovers, is lifted out of the class of smoke pornography into a class of pornography for cultivated degenerates.

Q. Do you agree with that?

A. No, I do not.

Q. Do you agree with this statement from State's Exhibit 5-B:

They should be ashamed, referring to Louis Malle and Jeanne Moreau, as should everybody else connected with such low class antisocial motion picture film.

[fol. 859] Q. Do you agree with that?

A. No, I would not.

Q. Are you acquainted with the publication known as the Hollywood Reporter?

A. No, I do not read that.

Q. Are you in agreement with this statement of Jack Moffitt in the Hollywood Reporter of November 2, 1959, and I quote:

Director Malle, with his shadowy shots of the heroine's bare and bucking torso seems to have his mind more on a fast franc (and a trans-Atlantic fast dollar) than on any profound comment on human nature.

Q. Do you agree with that?

A. No, I do not.

Q. Now, are you acquainted with Mr. Paul Mooney, movie critic for the Cleveland Press, and his review of November 11, 1959 in the Cleveland Press?

A. I am not familiar with Mr. Mooney of the Cleveland Press.

Q. Do you agree with this statement from Mr. Mooney's review of November 11, 1959, referring to the candid camera work?

At any rate, it makes the second-rate French offering [fol. 860] 'controversial' and, moreover, wholly objectionable as far as common decency is concerned.

Q. Do you agree with that?

A. No, I do not.

Q. Are you acquainted with Mr. Ward Marsh?

A. Yes, I am.

Q. Are you acquainted with his review of November 13, 1959, in the Cleveland Plain Dealer?

A. I have read that.

Q. Are you in agreement with his statement:

Without its shockingly nasty climax The Lovers would be shunned by all movie goers. With it the prurient minded will have a ball. I have read out of town reviews by so-called cognoscenti and the intelligentsia who have declared The Lovers to be screen poetry. The verdict here is a dull picture until it turns to screen pornography, and then it becomes nauseating.

Q. Do you agree with that statement?

A. No, I do not.

Q. Are you acquainted with the review of Stanley Kauffman in the New Republic of December 7, 1959?

A. No. I have not read that review.

Q. Are you in agreement with his statement that in The [fol. 861] Lovers the climax of lovemaking is detailed to the degree where the viewer has to leave the theater so that the couple can be alone.

Are you in agreement with that statement?

A. No, I am not.

Q. Are you acquainted with the magazine, The Nation, State's Exhibit 3?

A. I am acquainted with The Nation.

Q. Are you acquainted with the review in The Nation of November 28, 1959, and the review by Robert Hatch, Mr. Schuman?

A. I am not acquainted with the review.

Q. Do you agree with his statement to this effect, Mr. Schuman?

"Reduced to projections of a sexual revery, the principals of The Lovers are remote, stiff and objectively uninteresting. They too seem childlike, because men and women are never that free of their own past. To be more specific, when a woman walks out on a husband and child because a new acquaintance has roused and sated her she pays [fol. 862] some price for the change of alliance. If she pays no price, she is a moral idiot and unrewarding as a character of fiction."

Q. Do you agree with that statement?

A. I agree with one part, that she pays some price for the change in alliance.

Q. And you disagree with the rest?

A. I think I do.

Q. And with further reference to The Nation of November 28, 1959, State's Exhibit 3 and 3-a and 3-b, do you agree with the following statement:

It is no secret by now that The Lovers is erotic—

A. Would you define erotic for me, and then I can answer.

Q. You don't know the word erotic?

A. It means a lot of different things to different people.

Q. As you know the word erotic—

A. No,

Q. All right.

Are you acquainted with the review of this film in Newsweek, September 21, 1959?

A. I have read that review.

Q. Do you agree with this statement:

[fol. 863] I am referring to State's Exhibit 2 and 2-A and quote as follows:

"It is a completely amoral tale, and it contains one of the longest and most sensuous love scenes to be seen in this country since Hector was a juvenile delinquent."

Q. Do you agree with that?

A. I would say I do not. I thought that it was pretty vague.

Q. Pardon?

A. It is a vague statement.

Mr. Osborne: I have no further questions.

Judge McDermott: Anything further of this witness?

Mr. Kleinman: Yes.

* * * * * * *

[fol. 868] Wednesday morning, June 1, 1960, at 9:15 A. M.

Judge McDermott: I have been working since 8:00 A. M., and held you up because I have been working in Room No. 1 since that time.

We are with the defense still.

Mr. Kleinman: Call Mr. Spaeth.

Thereupon, the defendant, in order to further maintain the issues on his part to be maintained, called as a witness ARTHUR SPAETH, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Arthur Spaeth.

By Mr. Kleinman:

Q. Will you state your name, please?

A. Arthur Spaeth.

By Judge McMahon:

Q. Will you give us the spelling on your last name, please?

A. S-p-a-e-t-h.

Q. Thank you.

[fol. 869] By Mr. Kleinman:

Q. Where do you live?

A. Lakewood, 1194 Elbur Avenue.

Q. Married?

A. I am.

Q. Have children?

A. No; lost our child.

Q. Where are you employed, Mr. Spaeth?

A. I am now the theater and screen critic for the Heights Sun Press.

I formerly was the critic, both in drama and screen, for The Cleveland News.

Q. And how long were you drama and screen critic for the Cleveland News?

A. About 28 years.

Q. Cleveland News was a Cleveland newspaper, Mr. Spaeth?

A. Daily newspaper.

Q. Until about six months ago?

A. Until about three to four months ago.

Q. I see, and afternoon paper?

A. That is right.

Q. Do you have any idea of the circulation of the Cleveland News at the time that it became defunct, Mr. Spaeth? [fol. 870] A. I would say ranged between 137,000 and 150,000, somewhere in there.

Q. Now, would you state—prior to the time that you became drama and screen critic for the Cleveland News, how were you occupied otherwise?

A. I have been in journalism since 1921 as reporter, writer, city editor, courthouse reporter.

Q. Now, in connection with your occupation first at the News, would you tell us in a little more detail what your function was as drama and screen critic?

A. I was charged with covering all stage and screen entertainment, and passing upon its merit as cinema in terms of good standards of motion pictures and good standards in the field.

Q. Now, you are presently engaged in a similar work for the Sun Press?

A. Correct.

Q. During the time that you were film critic for The Cleveland News, approximately how many films did you see each year?

A. Then—oh, I would say between 300 and 400 a year, and it would vary.

Q. Did you see foreign films as well as domestic films, Hollywood films?

A. I did.

[fol. 871] Q. In the course of your employment as a film and drama critic, have you had occasion to meet with others in the field and engage in discussions relative to motion pictures and drama?

A. As in all walks of life, we talk shop.

Q. With specific reference to the film, "The Lovers," did you see the film, "The Lovers"?

A. I did.

Q. Will you state when you saw this film?

A. Exact date I could not, but I would say that I saw it probably three to four days prior to its opening at the—maybe not that long ago, but say two or three days before the opening at the Heights Art Theater.

Q. So far as you know—excuse me.

Was the film that you saw the same film that later showed at the Heights Art Theater?

A. So far as I know.

Q. Where did you see the film?

A. Twentieth Century-Fox screening room is where I viewed it.

Q. But this was a few days before the showing at the Heights Art Theater?

A. Yes.

Q. Did you write a review of the film, "The Lovers"?

A. I did.

[fol. 872] Q. Could you describe the film insofar as your recollection of the dominant theme of "The Lovers" is concerned?

A. Well, I would say it was a recollection that this was a film of upper middle class French life, a broken home broken by the loss of interest in the wife by the husband, and in the wife reaching out in other directions to occupy herself and to find interest.

Q. Now, based upon your opinion as a movie critic and the number of films that you have seen, do you have an opinion as to whether or not the dominant theme of "The Lovers" appeals to the prurient interests? Question is, do you have an opinion?

A. I have an opinion, and I can—

Q. Will you state your opinion as to the dominant theme, "The Lovers," and whether or not it appeals to the prurient interest?

A. Absolutely not, and it is a theme that has been used countless times.

Q. And could you state the basis on which you have arrived at this opinion as to whether or not it appeals to the prurient interest?

A. Reason originally stated, here is a view of a home in a French community of a strata of the social set in France in which a situation has developed, that it tells its story [fol. 873] simply, clearly, and develops the fact that when there is an estrangement, those in the estrangement will stray in another direction.

Q. Now, in observing the film, "The Lovers," and taking into account the number of themes in the film and the number of films that you have seen, do you have an opinion as to whether the film, "The Lovers," is in line with the development of films that you have seen dealing in matters of sex, generally?

Mr. Osborne: Objection, if the Court please.

(Conference held of the three judge panel at this time.)

Judge McDermott: Overrule the objection.

Q. You may answer that.

A. Ever since World War II there has been a growing trend toward more honesty on the screen, and the facts of life have been brought more into the open.

The old fairy tale approach to story telling has had to be discarded because people in this much more tense world —and the much more realistic facing of life—and conditions have demanded it.

That is true also in the theater and in the drama.

[fol. 874] Q. With reference to the technical aspects of the film, in your opinion is there any artistic merit in the film, "The Lovers"?

A. Great deal of artistic merit in sequences of the picture, and, in other words, I don't regard it as great a picture as many critics have, but I do think that it is a

fine picture in a great many of the sequences, and in overall it is about average.

Q. So far as photography is concerned, do you have any opinion about whether or not the photography is below average, average, or outstanding?

A. Take the night sequences in the open fields, the woods, and the river, and there is some outstanding photography and beautiful camera work, and real camera art.

Q. Do you know—withdraw the question.

Do you know of any awards that this film has won?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: If he knows, he may answer.

A. It seems to me, and I am trusting a rather dusty memory, but I think that it won an award at Cannes, and that is all I know, and that is all I have recollection of any [fol. 875] kind.

Q. Do you know Bosley Crowther picked that as one of the best ten films of the year in which it was produced?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Leading question, and sustained on that basis.

Ask Mr. Spaeth if he knows.

Q. Now, taking the film, "The Lovers," as a whole, and based upon the film that you have seen, and your experience in the field, do you have an opinion whether to the average person, applying the contemporary community standards, the dominant theme of the film, "The Lovers," appeals to the prurient interests?

A. I wouldn't think so.

Q. You wouldn't think that appeals to the prurient interest?

A. No.

Mr. Kleinman: You may inquire.

[fol. 876] Cross examination of Arthur Spaeth:

By Mr. Osborne:

Q. Sir, may I direct your attention to the Cleveland News, Wednesday, November 11, 1959, as represented by State's Exhibit 9 and specifically State's Exhibit 9-A.

Do you recall writing that review for the Cleveland News?

A. I do, sir.

Q. And at that time you said, did you not:

"Les Amants, The Lovers, takes to the Heights Art Screen Thursday night in all the frankness of the French about amour et sexe. I mention this because 'Les Amants' may shock the more conventional moviegoer—in fact, some of the camera's intimacy during tete a tete, etc., may leave viewer embarrassed and uncertain that the price of a ticket is excuse for invading lovers' privacy."

Q. Did you write that?

A. I did.

[fol. 877] Q. Do you hold to that opinion today?

A. That is right.

Judge Pincura: What was that last answer?

The Witness: I do hold to that opinion.

Judge McDermott: What is the date of State's Exhibit 9-A?

Mr. Osborne: November, 11th of November, 1959.

Judge McDermott: Thank you.

Q. And did you further say in that article:

"That beware out of the way, I can salute the sensitivity and excellently cinematic virtues of an adult observation of love that violates the social code."

Q. Did you write that?

A. That is right.

Q. What was the violation of social code that you refer to?

A. Adultery.

Q. And then there was an adulterous love portrayed, Mr. Spaeth?

A. That is right.

[fol. 878] Q. In what did the adultery consist in?

A. A woman having an affair with a lover.

Q. So that the presupposition is that at least one of them was married; right?

A. Right.

Q. Now, what do you mean by the affair? You used the word affair.

A. I presume that everyone has seen the picture?

Judge McDermott: Yes.

A. I mean the wife going to Paris.

Q. I did not understand.

A. Wife going to Paris.

Q. Yes.

A. And consorting with the polo player, and a thing that must be presumed, but that was the presumption.

Q. And is that wherein lies the adultery of the film?

A. Well, let us say that is the basic adultery of the film.

Q. You say that that is the basic adultery of the film?

A. Yes.

Q. Was there adultery in the relationship with the archaeologist?

A. Yes.

[fol. 879] Q. Of those, which was the more dominant, the adultery with the archaeologist or with the polo player, Mr. Spaeth?

A. On the basis of a continuing affair, the first one.

Q. First one was?

A. For the reason that it dominated a great deal of the film.

Q. And the first one was the adultery with the polo player?

A. From my memory, I would say that it was.

Q. In what respects is adultery a violation of the social code?

Mr. Terrell: Objection to that.

Mr. Kleinman: If the Court please, objection.

Mr. Terrell: I think this Court can take judicial notice of that.

Judge McDermott: Sustain the objection.

Q. Is there any other code, other than the social code, that is violated with regard to adultery as portrayed in this film?

A. Would you again, please?

[fol. 880] Q. Is there any code, other than the social code, which is violated as far as adultery portrayed in this film is concerned?

A. Well, with me, social code includes religion, the law.

Q. You are using it in a generic sense?

A. Yes.

Q. Thank you.

Did you see the version of the film that played in the State of New York?

A. No, I did not.

That is, not to my knowledge, and I don't know whether that was the same one that played here.

Q. Did you see the version of the film that was played in the city of Dayton?

A. Unless it is the same film, I don't know.

Q. Would you say that the dominant scene concerns sex?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

Mr. Kleinman: If the Court please, he said dominant scene.

Mr. Osborne: I withdraw that, and I meant to say domi-

[fol. 881] nant theme.

Judge McMahon: May we have the question as amended?

Q. Would you say that the dominant theme of the film concerns sex?

A. If again you go to the generic sense, and say that it is the division in the home, and division of the husband and wife, the affair in Paris, and affair in the home, yes, in that sense I would say so.

Q. Well, throughout these affairs there are tones, overtones and undertones, of sex, are there not, Mr. Spaeth?

Mr. Kleinman: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: If you know, Mr. Spaeth.

Mr. Kleinman: Objection, if the Court please.

The Witness: May I have the question again?
Judge McDermott: Read that to him, Mr. Sato.

(Question read.)

[fol. 882] Q. Throughout the film there are tons, overtones and undertones, of sex, are there not?
A. I would say yes.
Q. Pardon?
A. I would say yes.

By Judge McDermott:

Q. What was the answer?
A. Yes. I am sorry.

By Mr. Osborne:

Q. As a matter of fact, this movie wouldn't be the movie that it is if it weren't for the fact of sex, would it?
A. It is what the author was writing, two people divided by sex, and a woman's pursuit of sex in another direction.
Q. And united with at least one other person by sex?
A. Yes.
Q. Do you recall seeing the bedroom scene, Mr. Spaeth?
A. Yes.
Q. In her bedroom, that is, Jeanne Moreau's?
A. Yes.
Q. What sex act or acts took place there?
A. Well, from what I saw I can only say that a woman [fol. 883] experienced a sex act.
Q. Was the man, the archaeologist, part of the sex act?
A. I do not think so.
Q. Pardon?
A. I do not think so.
Q. And there was a sexual union between the two; is that right?
A. Right.

Mr. Osborne: No further questions.
Judge McDermott: Anything further, gentlemen?

* * * * * * *

[fol. 890] Wednesday morning, June 1, 1960, at 10:15 A. M.

Judge McDermott: Ready to proceed, gentlemen?
Mr. Kleinman: Defense will call Mr. Frankel.
Judge McDermott: Proceed, Mr. Kleinman.

Thereupon, the defendant, in order to further maintain the issues on his part to be maintained, called as a witness DANIEL FRANKEL, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Daniel Frankel.

By Mr. Kleinman:

Q. Where do you live?
A. New York City, 63 East 9th.
Q. What is your present occupation?
A. I am president of Zenith International Films Corporation.
[fol. 891] Q. And the Zenith International Films is the distributor of the motion picture film, "The Lovers," that is in issue in this case?
A. It is.
Q. Will you describe briefly your duties in conection with Zenith International Films?
A. As—
Q. Will you speak up a little?
A. Surely.
As president of the company, it is my responsibility to evaluate and select the pictures which we acquire for distribution.
Having done that, we import, and it is my duty to supervise imports of those pictures into the United States, the titling and the editing of them, and the preparation for distribution, advertising campaigns, and so forth, and the distribution of those pictures throughout the United States.
By distribution I mean the selling of those pictures to exhibitors.
Q. To exhibitors such as the Heights Art Theater, for example, for one?
A. Yes, sir.

Q. How many motion picture films do you—withdraw that.

[fol. 892] Q. Do you yourself view the films before you import?

A. Yes.

Q. Did you view the film, "The Lovers," before its importation?

A. I did.

Q. How many films, approximately, do you see in the course of a year in connection with your duties with the company?

A. Between 50 and 75.

Q. Would you describe the basis upon which you make your selection of a film for importation into the country?

A. First of all, there is the subjective reaction, grosso modo; if the picture appeals to me personally, I then am interested in the film.

Secondly, and equally important, the critical acclaim that the picture has received in the country of its origin, and also the other countries of Europe where the picture may have been shown prior to my acquisition of it.

Those things are extremely important to me in making the selection.

Q. With reference to the film, "The Lovers," what particular aspects of the film, or critical acclaim, entered into [fol. 893] your judgment to have the film imported into this country for your company?

A. First of all, when I saw the picture, and this is subjective reaction, I thought it one of the most beautiful pictures I had seen in many years.

Secondly, and equally important, and this goes back to September, 1958, the picture was selected for showing at the Venice Film Festival, and it received the Silver Lion award.

Mr. Osborne: Objection, unless he was there.

By Judge McDermott:

Q. If he knows.
Do you?
A. Yes.

Judge McDermott: Let that stand for the record.

By Mr. Kleinman:

Q. And the Silver Lion award is what?

A. It is the award given to the film selected for second best.

The Golden Lion award is given for the top picture, and in this case the Silver Lion award was given to The Lovers for second place.

Q. Who gives this award?

[fol. 894] A. Award accorded by an international jury selected among a number of nations present there at the Venice Film Festival.

I don't know the name of the American juror, and that escapes me, but he was represented.

Q. Are American films shown at this festival as well as foreign films?

A. Yes.

Q. Do you have knowledge of any other award that the film had won prior to your importation of it into this country?

A. One.

Q. What was that?

A. It received the Golden Plaque of Brazil, which was subsequent to our importation of the picture into this country.

Q. In connection with the importation into this country, was this film, to your knowledge, viewed by the Customs Department?

A. Yes.

Q. Were you present at that viewing?

A. I was.

Q. And this viewing was arranged by whom, Mr. Frankel?

A. By the deputy. How do you mean? Referring to [fol. 895] the people in the customs department?

Q. Arranged by the Customs Department, so far as you know?

A. Yes.

Q. And do you know what the result of the viewing was

by the Customs Department insofar as its determination as to whether or not the motion picture was obscene, Mr. Frankel?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustain the objection.

State courts are not bound by that ruling.

Mr. Terrell: They would not have to be bound, but that is part of the evidence.

Judge McDermott: Sustained that objection!

Q. Was the film permitted to be imported by the Customs Department?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

[fol. 896] Mr. Osborne: Withdraw the objection.

Q. You may answer the question, Mr. Frankel.

A. Yes.

Judge McMahon: We did not hear your answer.

The Witness: Sorry. The answer was, yes.

Q. Could you state what other films were imported by Zenith International during the same year in which The Lovers was imported?

A. There were a total of three pictures imported and distributed by Zenith during the year 1959.

Q. Would you say what films those were?

A. First, in February—Devil Strikes at Night, an award winner at the Berlin Film Festival.

The second, present picture.

The third, 400 Blows, which was an international award winner, and winner of the New York Critic Award as the best picture of 1959.

Q. Those were the three pictures which Zenith International distributed during the course of the year 1959?

A. That is correct, sir.

Q. Could you state whether the film, "The Lovers," is [fol. 897] shown in other theaters, other than the Heights Art Theater in Cleveland?

A. Yes, indeed.

Q. Will you state some of the cities that you can recall where the film, "The Lovers," was and is being shown?

A. New York; Washington; Boston; Los Angeles, California; San Francisco, California; Stamford; Hartford; Providence, Rhode Island; and a number of the smaller cities in New York state.

Also, Detroit, Michigan and Denver, Colorado, and I don't know whether I mentioned that before.

Q. No.

A. I am sorry.

From memory it is difficult to cite all of them, but I would say about 100 cities throughout the United States.

Houston, Texas; Dallas, Texas; but I can't enumerate them all.

Q. Approximately 100 cities?

A. Yes.

Q. And in the State of Ohio, would you tell us in what cities the film, "The Lovers," has been shown?

A. Well, of course, Cleveland, under circumstances that we know? Dayton, Ohio, similar circumstances.

[fol. 898] Columbus, Ohio; Toledo, Ohio. I think those are all the cities in Ohio where the picture was shown.

Q. Would you state to the Court in what cities, if any, the showing of the film was terminated by action of the law authorities?

A. Referring nationally in the United States?

Q. Yes.

A. Of course, we have Cleveland, Dayton.

Portland, Oregon; terminated—by terminated you infer that it had been shown and had been terminated?

Q. That it had been shown but because of the arrest or interference by the police department was stopped.

A. I believe that is all. Yes, that is all in that category.

Q. How long have you been engaged in the motion picture industry yourself?

A. Since leaving college in 1925, a total of 35 years.

Q. Prior to becoming an official of the Zenith International Pictures, what was the nature of your activity in the motion picture industry?

A. Well, succinctly as possible, initially I was a distribu-

tor; subsequently, a producer and exhibitor in Paris France [fol. 899] for a period of five years; and after that returned to the United States and became general manager for the Pathe Film Corporation, and that was for ten years, incidentally.

After that, associated for a period of two years with Sir Alexander Korda, a producer and part owner of United Artists, and subsequent to that varied personnel activity as well as connected with the motion picture industry, and consultant for Twentieth Century-Fox and for Paramount.

In the fifties employed by United Artists in the European zone, in distribution there; and in 1956 I returned to the United States and started Zenith International.

Q. In connection with your engagement in the motion picture industry, have you had an opportunity to observe the treatment of sex and adultery, and related subjects, in motion picture films, generally?

A. Yes.

Q. Would you state what has been your observation with respect to the treatment of these subjects in the past ten years?

A. During the past ten years there has been a liberalization of treatment with respect to the so-called sex facet of life.

Q. And would you say that adultery as a subject for [fol. 900] motion pictures has or has not been treated extensively by the motion picture film industry?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel at this time.)

Judge McDermott: Overrule the objection.

The Witness: Counselor, do you mean qualitatively or quantitatively?

By Judge McDermott:

Q. Yes or no?

A. Yes.

Q. His answer is yes.

A. I am sorry.

By Mr. Kleinman:

Q. Now, your statement there, would it or would it not apply to domestic films as well as to foreign films?

A. To both.

Q. With specific reference to the film, "The Lovers," do you know or have you met, or do you know of the reputation of Louis Malle, director of the film?

A. I know Mr. Louis Malle personally, and I know of his reputation.

[fol. 901] Q. Will you state what his reputation is in the motion picture industry?

A. Mr. Malle—with respect to France, Mr. Malle is considered a titan of the so-called "new wave" of directors in France.

Prior to making "The Lovers," he produced two pictures, and the first one, "The Silent Ones," which received international acclaim, including an oscar in Hollywood.

The second one called Elevate to the Scaffold has not yet reached these shores, and there is a psychological murder—

Mr. Osborne: Objection, and he is not being responsive to the question to—

Judge McDermott: The latter part of the answer at least should be stricken and should be disregarded, and the rest of it may stand.

The Witness: I am sorry. Shall I continue?

Judge McDermott: Wait for another question, Mr. Frankel.

Q. Do you know Jeanne Moreau, the female star of the film?

A. Yes.

[fol. 902] Q. Do you know her personally?

A. Yes.

Q. Do you know her reputation in the art?

A. I do.

Q. Would you state what is the reputation of Jeanne Moreau?

A. For the past six and one-half to seven years Jeanne Moreau is the acknowledged leading legitimate actress in France.

Q. Now, again with regard to the film, "The Lovers," importation and distribution of the film, "The Lovers," did it differ in any way from the importation and distribution of any other film with which Zenith International deals?

A. As passed by the United States Customs, there wasn't a scintilla of difference.

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Sustained, and the Court will disregard that answer.

Q. Now, as a—withdraw that.

Now, again with specific reference to the film, "The Lovers," the film opens, you will recall, with a map as a background for the credits of the film?

A. Yes.

[fol. 903] Q. Do you have any information with respect to that map?

A. Yes.

Q. Would you describe what the map is and what you know of it?

A. I questioned Mr. Malle himself concerning it, and Mr. Malle replied that—

Mr. Osborne: Objection, if the Court please.

Judge McDermott: He cannot tell what Malle said to him.

Q. You cannot tell the conversation that you had with Mr. Malle.

Do you know where this map came from?

A. Yes.

Q. Where did it come from?

A. A museum in Dijon, and it is an eighteenth century map describing—

Mr. Osborne: Objection, and the question was where it came from, your Honor.

Judge McDermott: Yes; another question.

The Witness: I am sorry.

Q. Having observed motion picture films for a good [fol. 904] number of years, and based upon your experience in the industry, do you have an opinion whether to the

average person, applying contemporary community standards, the dominant theme of the film, "The Lovers," appeals to the prurient interests?

Do you have an opinion?

A. I do.

Q. What is your opinion?

A. That it definitely does not appeal to the prurient interest.

Q. Would you describe what you take to be the dominant theme of the motion picture film, "The Lovers"?

A. The picture in itself portrays contemporary life in a certain segment of French society where the principal protagonist, Jeanne Moreau, who, incidentally, is portrayed as a fairly intelligent woman, where she leads a fairly bored life, portrayed by the neglect and inattention of her husband.

She, as a woman of this stratum of French society, has initially an affair, clandestine affair, with a lover in Paris.

Mr. Osborne: I will object to any further reference to what is the dominant theme, and this is narrative.

[fol. 905] Judge McDermott: Sustained, and he is going beyond.

Now, another question, Mr. Kleinman. The dominant theme was the question.

Q. Could you state succinctly, rather than narrating the film, what to your mind is the dominant theme of the film, "The Lovers"?

A. The dominant theme is the frustration of a woman in a certain segment of French society, and her ultimate release from that frustration through meeting a person whom she believes to be in love with.

Mr. Stuplinski: Could we have that last word, Mr. Sato?

(Reporter read back the latter part of the answer.)

Mr. Kleinman: You may inquire.

[fol. 906] Cross examination of Daniel Frankel.

By Mr. Osborne:

Q. Mr. Frankel, how long have you lived in Cuyahoga County?

A. I have not resided in Cuyahoga County.

Q. You have not resided in Cuyahoga County?

A. No, sir.

Q. How long have you lived in New York?

A. Oh, I am 56, and I would say about 44 years.

Q. What are the community standards of Cuyahoga County as far as the pictorial representation, depiction, or discussion of matters concerning sex is concerned, Mr. Frankel?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Objection is overruled.

He ought to have a chance to answer, if he knows.

A. I assume—

Q. Well, no, but I am asking you a question and not an assumption, sir.

What do you know are the contemporary standards of [fol. 907] this county with reference to that subject that I asked you about?

A. I do not know.

Q. You do not know?

A. I don't know.

Q. You said you do not know?

A. That is correct.

Mr. Osborne: We will ask that his testimony concerning the effect upon the average person taking into consideration the community standard and prurient interest be withdrawn from consideration.

Mr. Kleinman: If the Court please, I would like to be heard on that question.

Judge McDermott: Yes. The Court has been very liberal with you both.

Mr. Kleinman: With respect to this particular objection of the prosecutor, if the Court please—

Judge McDermott: Speak out, and the Court will hear you.

Mr. Kleinman: I am not aware that the question is the contemporary community standard of the County of Cuya-
[fol. 908] hoga, and I don't believe any court has constructed any particular community, and the contemporary community standard could very well be contemporary standard one, but the question has never been determined that the standard that we are talking about is a geographical standard within the United States, or whether it is a standard within the United States as a whole, and I think that this is very relevant to this question, this being a motion picture that is distributed nationally.

The fact that this man has not lived in Cuyahoga County should not prevent him from testifying whether or not this film contravenes contemporary community standards.

Mr. Terrell: May I add one word, please?

Judge Pincura: One counsel at a time, please.

Court has called for the prosecutor, and will you please sit down.

Mr. Terrell: All right, but their own witnesses said New York and Cleveland.

Mr. Osborne: May it please the Court, it will be re-
[fol. 909] called that during the cross-examination of the State's witnesses and during the examination of the defense witnesses the defense inquired as to the community standards of Cuyahoga County, and predicated its questions upon two things:

They would ask, have you come in contact with the people of Cuyahoga County, and, secondly, have you resided in Cuyahoga County, and are you acquainted with the community standards of Cleveland.

Now the position taken by the defense is somewhat different. This case is being tried in Cuyahoga County Common Pleas Court, and is being tried by three judges who are assigned within this county for this court, and one judge who has come from an adjoining county in this court.

The evidence all along has been, what are the standards within this area, and questions were asked by the opposition relative to Cuyahoga County as far as the average per-

son is concerned and whether or not the average person in Cuyahoga County is the same as the average person in New York, Memphis, and Dallas, and the whole import of [fol. 910] the position taken by the defense is the community standard of Cuyahoga County.

Secondly, this gentleman testified in answer to a direct question, do you know what the contemporary standards of Cuyahoga County are with reference to pictorial representation of matters concerning sex, and his answer was, I don't know. If he doesn't know, I ask upon what basis may he testify as to whether or not taking into consideration the contemporary community standard of Cuyahoga County this film, The Lovers, would appeal to the prurient interests of the average person in Cuyahoga County?

Mr. Kleinman: If the Court please, I think the prosecution has answered its own question, and their own witnesses have testified that the community standards of Cuyahoga County are not any different from other cosmopolitan standards in the country.

We have necessarily gone into the question about Cuyahoga County because that is where these people live, and we have never restricted the community standard to the County of Cuyahoga, and I think that testimony from both sides would indicate that this man would have as much [fol. 911] knowledge about community standards in Cuyahoga County by reason of his experience in other counties.

Mr. Osborne: But, your Honor, this man hasn't testified about community standards of any community within the United States.

Mr. Kleinman: That is something for the prosecution to inquire.

Mr. Osborne: We will rest on our motion.

(Conference of the three judge panel held at this time.)

Judge McDermott: Gentlemen, the Court's feeling about this motion is that in view of the decision in the Roth case, and in view of the liberality even in this case, that this motion should be overruled, and the answers could stand for what they are worth.

Mr. Terrell: Thank you, Judge.

Judge McDermott: You may have your exception.

By Mr. Osborne:

Q. Would you say that the dominant theme of this movie, The Lovers, concerns sex?

By Judge McDermott:

[fol. 912] Q. Yes or no?

A. No.

By Mr. Osborne:

Q. Well, what is the dominant theme?

A. I believe I have so testified a few minutes before. The dominant theme is the unhappiness, frustration, of a woman in a certain segment of French society, and her ultimate escape from that through her belief that she has fallen in love with the male protagonist in the picture.

Q. You are saying, believes that she has fallen in love with the male protagonist. That is part of the narrative?

A. Yes.

Q. Does that involve sex, the belief that she has fallen in love?

A. It involves—to a great extent sexual attraction, yes, sir.

Q. And, as a matter of fact, she had some sexual connection with the protagonist as you call him, did she not?

A. By inference, yes.

Q. All right.

Now, what sexual contact did you infer?

[fol. 913] A. I have used—I am sorry, Mr. Prosecutor, but I have used the term sexual attraction rather loosely. If I may elucidate and—

Q. That is why—

Mr. Terrell: If the Court please, let him elucidate.

Mr. Osborne: You can protect him on redirect.

Mr. Terrell: If the Court please, let him finish his answer.

Judge McDermott: Are you through now?

Mr. Terrell: He wanted to elucidate.

Judge McMahon: It is impossible for the court reporter

to take this when you are all talking at once, gentlemen. Let us give our reporter some consideration.

Judge McDermott: You will have a chance to go back to the witness.

Q. Now, what sexual contact took place between the archaeologist and the so-called heroine?

A. Well, after having originally met him en route to Dijon and in the home—in her own home—she ultimately proceeds to the garden. From there, there is considerable—[fol. 914] there is a highly emotional scene wherein he realizes that he is in love with her.

Q. Sir, my question is, what sexual contact took place between the archaeologist and the so-called heroine?

Mr. Terrell: May I address my objection?

Judge McDermott: Question is a very simple one.

Mr. Terrell: He is giving an answer, and why should he be interrupted?

Judge McDermott: He did not give an answer and went around the yard.

A. What sexual act took place, that is what you asked, isn't it?

Q. Yes.

A. Sexual contact. May I proceed, your Honor?

Judge McDermott: What sexual contact took place, is the question.

A. In the boat and subsequently in the bedroom.

Q. Now, sir, will you answer the question. What sexual contact took place between the archaeologist and the so-called heroine?

A. Well, the kissing in the boat, and the kissing in the bedroom.

[fol. 915] Q. And is that all?

A. Of my own knowledge I don't know of anything else. I think by inference we can assume that a far more intimate act took place.

Q. I did not understand that. A what?

Mr. Kleinman: He said more intimate.

Judge McDermott: What did you say?

The Witness: Far more intimate, and that by inference, that a far more intimate act took place. It isn't explicitly portrayed in the picture.

Q. Now, what far more intimate act took place, Mr. Frankel?

A. I am not sure that it did, but by inference an act, a sexual act could have taken place.

Q. What sexual act could have taken place?

A. Well—

Mr. Kleinman: You may answer.

A. A sexual act and, after all, sir—

Judge McDermott: There are different kinds, and what kind did you see?

Mr. Terrell: He did not see any, he said.

[fol. 916] Judge McDermott: He said that he inferred that.

The Witness: That a normal sexual act took place, and I don't know how else to categorize that.

Q. That is what you inferred?

A. Yes, sir.

Q. And where did you infer that that took place?

A. In the bedroom and on the bed.

Q. Upon what did you base the inference that a sexual act took place?

Mr. Terrell: Objection, if the Court please.

Judge McDermott: I think that is a proper question, and you may answer.

Q. What are the facts upon which you inferred that?

A. May I state that I believe that I said might have taken place?

Judge McDermott: Yes.

Q. Will you tell us the facts upon which you made the inference that a sexual act took place?

A. The male protagonist is on the bed with Jeanne Moreau. He kisses her. We see shots of her reacting to the kisses, and possibly, although not explicitly portrayed, [fol. 917] the sexual act itself.

Q. Now, did you infer from her facial reactions, her heaving, and breathing, heaving bosom, and breathing heavily, and the actions of her left arm and left hand, that she was undergoing an orgasm?

A. No.

Q. You did not?

A. No.

Q. All right.

Now, you say he was on the bed with her during this sexual act?

A. There again, Mr. Prosecutor, I did not say during the sexual act, but I said that it might be inferred.

I am sorry, but I want to be understood. I don't want to be caviling.

Q. We don't believe that you cackle.

Mr. Kleinman: If the Court please—

Judge McDermott: Will the lawyers refrain from this, and this is not evidence, as you well know.

Mr. Osborne: I will withdraw that.

Q. You inferred that a sexual act took place, Mr. Frankel? [fol. 918] A. I inferred that it might have been construed to have taken place.

Q. Now, when you inferred that might have been construed to have taken place, at that point was the male protagonist, as you call him, on the bed?

A. Yes, he was. He was on the bed.

Q. You saw him on the bed?

A. Yes, sir.

Q. All right.

Now, in what state of dress or undress was the woman at this time when you inferred that a sex act might have taken place?

A. That I could not truthfully answer, sir, because there is no blatant nudity in that scene.

I cannot state what state of dress or undress that she was in with any precision.

Q. All right.

Did you infer what her state of dress or undress was at that point?

A. Yes. I inferred that she was nude from the waist up.

Q. And did you infer whether she was nude from the waist down when you inferred that a sex act might have taken place?

[fol. 919] A. Well, sir, I could not say since there is nothing in the film that portrays that. I could not speculate on that.

Q. You saw the scene prior to her taking the position on the bed, didn't you?

A. Yes.

Q. And she was wearing a nightgown, wasn't she?

A. Yes,

Q. And you saw him remove both straps from her shoulders?

A. Yes.

Q. And you saw the nightgown drop quickly down and out of the—out of sight?

A. Yes, down to her waist.

Q. Did you see it stop at the waist?

A. I am not sure.

Q. All right.

Now, sir, what inference did you draw as to her state of dress or undress at that time?

A. Well, precisely what I said before. I do not know what underclothing she may have had on at that time.

Q. But you inferred that a sex act might have taken place?

A. Might have taken place.

[fol. 920] Q. What state of dress or undress was the male protagonist at the time that you infer a sex act might have taken place?

A. Well, from the scene immediately preceding, Miss Moreau removed his shirt, so that I know that he was—that he was nude from the waist upwards. As to anything else I don't know.

Q. Well, when you saw him get out of the bed and go toward the bathroom, you saw him with his bare legs?

A. Yes, sir.

Q. And you stated that you infer that a sex act might have taken place?

A. Yes, sir.

Q. Now, has this motion picture been shown in the City of Chicago, Illinois?

A. No, sir.

Q. Do you know, sir, that there is motion picture censorship in the City of Chicago? Don't you?

A. Yes, sir.

Q. Zenith International, that is a corporation; isn't it?

A. Yes, sir.

Q. Do you own any shares of stock in this corporation, Mr. Frankel?

[fol. 921] A. Yes.

Q. How much?

A. It is quite substantial.

Q. Well, give us a substantial idea, sir?

A. Approximately one-half.

Q. And in terms of money, what is one-half of the shares of stock worth?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overruled, and the same theory as to the testimony from another person connected with this theater.

Mr. Kleinman: Exception.

A. Truthfully, Mr. Prosecutor, I don't know. It would be hard for me to evaluate that.

Q. Well, certainly you have some idea; don't you?

A. At the present moment I have only the vaguest of ideas.

Q. Well, give us the vaguest of ideas, sir, if that is the best that you can do?

A. Yes, sir.

Q. Go ahead.

A. I believe my stock holding and net worth of my stock in Zenith International at this time is worth $25,000.00 to $30,000.00.

[fol. 922] Q. $25,000.00 to $30,000.00?

A. Yes.

Q. Then, you are saying that the net worth of Zenith International would be about $50,000.00 or $60,000.00. Is that correct, sir?

A. Well, sir, that is subject to many imponderables that, unfortunately, I cannot evaluate at this time.

Q. Well, sir, if you have fifty per cent of the stock, and it is worth $25,000.00 to $30,000.00, isn't it fair to say that all of this stock is worth about $50,000.00 to $60,000.00?

Mr. Kleinman: Objection, and this is far from the truth.

Judge McDermott: Overrule the objection.

Proceed.

Q. Is that a fair statement, Mr. Frankel?

A. No, sir; it isn't.

Q. All right.

Now, you have a personal interest in the outcome of this lawsuit, don't you?

A. Yes, indeed.

Q. Was Zenith International party to a lawsuit concerning this movie in the City of Chicago, Illinois, Mr. Frankel?

[fol. 923] By Judge McDermott:

Q. If you know.

A. Yes, I do.

By Mr. Osborne:

Q. Do you?

A. Yes.

Q. Did you testify at that trial?

A. No.

Q. That trial took place in the Federal District Court, didn't it?

A. Yes, sir.

Q. And at no time has this movie been shown in Chicago, Illinois?

Mr. Terrell: Objection, if the Court please.

Judge McDermott: Overrule the objection.

A. You mean by showing to the public?

Q. Yes.

A. No.

Q. Was that shown to the Censor Board in Chicago, Illinois?

A. Yes, sir.

Q. It was censored by law in the State of New York; isn't that correct?

[fol. 924] A. Yes.

Q. Now, the same film that was shown here in Cleveland Heights is not shown to the public in the State of New York in its entirety?

A. In its entirety, no.

Q. Now, in New York—there was a deletion made in the film where the man removes or comes to remove the slip from the shoulders of the woman; isn't that right?

A. Yes, sir.

Q. And the scene where they move from this undressing episode toward the bed, as they move toward the bed, that was eliminated, wasn't it?

A. Yes, sir.

Q. And the scene where the woman is lying on the bed with her nude breasts exposed, that was eliminated, wasn't it?

A. Yes, sir.

Q. And the scene where she is in bed leaning on the back of the man and writing something with her finger on his back, that was eliminated in New York; wasn't it?

A. Yes, sir.

Q. So, as far as you know, there are two prints of this film, generally speaking, two different kinds?

[fol. 925] A. Versions.

Q. In existence?

A. Yes, sir.

Q. One shown at the Cleveland Heights Art Theater and the other one being shown in the State of New York; isn't that right?

A. Yes, sir, except that the one being shown in the Cleveland Heights Art Theater is currently being shown over vast areas of the United States, too.

Q. All right.

Now, the one that was shown in Dayton, Ohio, that was the same as the one shown at the Cleveland Heights Art Theater?

A. Yes, sir.

Q. This film in no version is being shown in the State of Maryland?

A. No.

Q. Have attempts been made by Zenith International to show that film in Maryland?

A. No. An attempt was made by Zenith International, and I was present, to secure a censor seal from the State of Maryland.

Q. Well, the State of Maryland requested several deletions; isn't that right?

A. Yes, there were two deletions requested.

[fol. 926] Q. And Zenith International did not comply with the deletions?

A. I refused to make those deletions.

Q. When you speak of "I," are you speaking as president of Zenith International?

A. Yes.

Q. And the film, "The Lovers," isn't shown in any version in the State of Maryland?

A. Not at the present time.

Q. This film is not shown in any version in the State of Virginia?

A. No, sir.

Q. Were attempts made to have that shown in that commonwealth?

A. There, without either my knowledge or consent.

Q. I have asked a question, sir, and will you please answer?

A. An attempt was made to secure a Virginia seal.

Q. And Virginia requested several deletions, didn't they?

A. I am not sure, since I wasn't, and Zenith wasn't directly involved.

Q. Did Virginia request any deletions?

A. I am not sure.

Q. You don't know in your position as president and [fol. 927] general manager of Zenith, and—

Mr. Terrell: Now, wait a minute, and—

Judge McDermott: You may answer yes or no.

A. For an excellent reason, I don't know.

Q. You don't know?

A. I don't know.

Q. Do you know this film is not shown in the State of Virginia in any version?

A. That is correct.

Q. And when it was shown in Memphis, Tennessee, it was shown after it was censored in Memphis and deletions were made?

Judge McDermott: Yes or no, if you know.

The Witness: I am trying to think of the circumstances, your Honor, and this was some several months ago.

Judge McDermott: Go ahead, and take your time.

The Witness: Deletions were made by the manager of the theater, but whether that was at the behest—

Q. I am not asking you that. I am asking you if dele-
[fol. 928] tions were made, and I am asking in general, Mr. Frankel?

A. Deletions were made.

Q. The picture shown in Memphis is not at all the same as the one shown in the Cleveland Heights Art Theater?

A. No.

Q. Now, you have testified about it being shown in Portland?

A. Yes.

Q. Portland—

A. Portland, Oregon.

Q. Now, in Portland, Oregon, the city refused to license its showing; isn't that correct?

A. No, sir.

Q. When it was shown in Boston, the New York version of the film was shown there and not the Cleveland Heights Art Theater version?

A. That is correct.

Q. So, then, it was a cut down version of the film that was shown in Cleveland Heights Art Theater, the one that was shown in Boston, Massachusetts?

A. By cut down you mean 131 feet deleted from the original 8,100 feet of film.

Q. And those same deletions that I asked you about re-
[fol. 929] fer to the showing in New York; isn't that right, Mr. Frankel?

A. Yes, sir.

Q. Now, when it was shown in Louisville, Kentucky, you don't know if it was the New York version shown or the Cleveland Heights Art Theater version shown, do you?

A. I am sorry, sir, but I do not know.

Q. Now, it wasn't shown in Columbus?

A. Yes, sir.

Q. What theater?

A. At the Art—Grand Theater—Art Theater in Columbus—Bexley Art Theater.

Q. Bexley is not in Columbus, is it?

A. That is my understanding.

Q. That is a suburb, isn't that right?

A. It is a suburb.

Q. Well, then, it wasn't subject to the operation of the police department of Columbus, Ohio, was it, Mr. Frankel?

Mr. Terrell: I object, and that is argumentative.

Judge McDermott: If he knows.

Q. Was it in Columbus?

Judge McDermott: Bexley is a suburb.

[fol. 930] Mr. Terrell: He is asking him questions about the police department, your Honor.

Mr. Osborne: He was asked before whether or not police officers ever interfered.

Judge McDermott: Do you know whether the police officers ever interfered, Mr. Frankel?

The Witness: I do not know that.

Q. Well, the jurisdiction of the police department of Columbus, Ohio, does not extend to Bexley, does it?

Mr. Kleinman: Objection, and that is not proper.

Judge McDermott: Sustain the objection, and we don't know if it does.

Q. Now, when you stated on direct examination that it was shown in Columbus, Ohio, do you wish to rephrase or revise that answer that you gave on direct examination, Mr. Frankel?

Mr. Terrell: Objection, if the Court please.

Mr. Kleinman: Objection, and argumentative.

[fol. 931] Judge McDermott: Sustain the objection, and he has answered that.

Q. Are the community standards in Dayton, Ohio, substantially the same as those of Cleveland, Cuyahoga County?

A. I do believe so.

Q. Are the community standards of the City of Chicago substantially the same as those of Cuyahoga County?

A. I do believe so.

Q. Are the community standards of Boston essentially the same as those of Cuyahoga County?

A. I do believe so.

Q. Are the community standards of Memphis, Tennessee, the same as those of Cuyahoga County?

A. Same response.

Q. All right.

Are the community standards of the City of New York substantially the same as those of Cuyahoga County, Ohio?

A. I do believe so.

Q. Now, you arranged for this film to be brought over here, didn't you?

A. Yes, sir.

Q. And did you arrange for it to be shown in the [fol. 932] Cleveland Heights Art Theater?

A. Yes, sir.

I made an agreement with the circuit owning the Cleveland Heights Art Theater.

Q. Where was that agreement made?

A. The agreement was made in New York City in our offices.

Q. Who was present at the agreement?

A. Mr. Schuman and Mr. Sher.

Q. Mr. Schuman testified here yesterday, and is that the same one?

A. Yes.

Q. And Mr. Sher is here in the courtroom?

A. Yes, sir.

Q. Now, you mentioned that the film was shown in smaller cities in New York State?

A. Yes, sir.

Q. Was the censored version shown in the smaller cities in New York State?

A. It would have to be, sir.

Judge McDermott: We will take a short recess at this time.

We agreed we would finish with Mr. Frankel before we would adjourn. Is that all right?

[fol. 933] Mr. Osborne: That is all right with us, Judge.

(Recess held at this time.)

Judge McDermott: All right, gentlemen, ready to begin. Mr. Frankel, will you resume the stand, please?

Mr. Frankel: Yes.

By Mr. Osborne:

Q. Mr. Frankel, are you acquainted with A. H. Weiler, movie critic for the New York Times?

A. Yes, sir.

Q. Are you acquainted with the trade magazine known as Variety?

A. Yes, sir.

Q. Now, as a matter of fact, this movie, "The Lovers," was banned in several European areas, wasn't it?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Overrule the objection.

[fol. 934] A. As a matter of fact, it wasn't.

Q. It wasn't?

A. That is correct.

Q. And, as a matter of fact--

Judge McDermott: I did not hear your answer.

The Witness: It wasn't banned in any European areas.

Mr. Kleinman: Withdraw the objection.

Q. It was banned in Italy?

A. No, sir.

Q. How much did your organization pay for the film, Mr. Frankel?

Mr. Terrell: Objection, and is that material?

(Conference held at this time of the three judge panel.)

Judge McDermott: Sustain the objection, and that has nothing to do with the subject matter.

Mr. Terrell: Thank you, your Honor.

Mr. Osborne: That is as to the last question?

[fol. 935] Judge McDermott: Yes, sir; nothing to do with it.

Mr. Osborne: Pardon?

Judge McDermott: It has nothing to do with the subject matter of the indictment and the offenses stated.

Mr. Osborne: I have no further questions.

Judge McDermott: Anything further of this witness?

Mr. Kleinman: Yes.

Judge McDermott: Proceed, and let us finish up with Mr. Frankel so he can return to New York today as he has requested.

* * * * * * *

[fol. 939] Recross-examination of Daniel Frankel.

By Mr. Osborne:

Q. What eliminations were ordered by the Maryland State Board of Motion Picture Censors?

A. One, the scene—shot of the two hands clasped on the bed.

Second, the second half of the bathtub scene. That is the section where the bare man slides into the tub with Jeanne Moreau.

Q. Is that all?

A. That is all I can recall now, bearing in mind, sir, that this being a conversation with the people there that took place some several months ago.

Q. Well, you received a copy of the order of the Board of Motion Picture Censors, didn't you?

A. I don't recall that I did, but I think our distributor in Washington, who has jurisdiction over that area, received that.

Q. Mr. Goldstein is chairman of the board, isn't that right?

Q. And in the order of the Board it was ordered, was

A. Oh, yes.

it not, that in the bedroom sequence between Jeanne and [fol. 940] Bernard, that all views be eliminated from the time Bernard slips the straps of the nightgown from Jeanne's shoulders, where he embraces her, and the scene in which Jeanne's breasts were shown, and after that the scene in which Jeanne is leaning on the back of Bernard and she writes something on his back with her finger. It was never clearly delineated. Bernard turns around to her and says, "What did you write?" Jeanne answers, "Guess."

Is that correct, that the Board ordered those particular scenes eliminated?

A. That was initially, but, pursuant to conversation that I had with Mr. Goldstein and other members of the Board, that was subsequently modified; and it was left that I was to meet with them later on; and, in fact, I received a letter from Mr. Goldstein that I come to Baltimore for the purpose of discussing that, but so far I have had more important things to occupy my time, and I have not had time to do so.

Q. We know that you are a busy man.

Mr. Terrell: I object, and that is argumentative, and where are we now going?

Judge McDermott: Yes; leave that part out.

[fol. 941] Q. But Zenith has not complied with the orders of the Maryland Board, have they?

Mr. Terrell: Objection to that, and it hasn't shown in Maryland.

Mr. Osborne: I will withdraw that in view of the statement of Mr. Terrell.

Q. What were the parts ordered to be eliminated in the State of Virginia?

Mr. Kleinman: Objection to that, if the Court please.

Judge McDermott: Overrule the objection.

If you know.

The Witness: I do not know, sir.

Q. Well, did you receive a copy of the order of the division of motion picture censorship coming out of Richmond, Virginia?

A. No, sir.

Q. Well, were portions ordered to be eliminated, Mr. Frankel?

A. I don't know, sir, but I assume so.

Q. Well, you are located in the Paramount Building, New York, New York?

A. Yes, sir.

[fol. 942] Q. And you don't know whether or not your organization, your company or corporation, received an order from the Division of Motion Picture Censors in Richmond?

A. I don't recall having received such an order, Mr. Prosecutor.

Q. But you don't deny that it was received?

Mr. Kleinman: Objection. He said he doesn't recall.

Judge McDermott: Another question now.

Mr. Osborne: No further questions.

Judge McDermott: Anything further gentlemen?

[fol. 943]

Further redirect examination of Daniel Frankel.

By Mr. Kleinman:

Q. One last question:

By the terms of your agreement with the people that distribute your film, do they have the right to tamper or cut any part of the motion picture?

A. Neither the distributors nor the exhibitors have the right to cut the film without our knowledge and consent.

Mr. Osborne: Are you finished?

Mr. Kleinman: Yes.

Judge McDermott: Let's get through, gentlemen.

[fol. 944]

Further recross examination of Daniel Frankel:

By Mr. Osborne:

Q. If Mr. Jacobellis did not want to show that picture at the Heights Art Theater, no one in the world or in your company could have made him show that?

Mr. Terrell: Objection, and that is argumentative.

(Conference held of the three judge panel at this time.)

Judge McDermott: The Court will allow the answer to be made.

Have you got that question?

The Witness: Would you repeat that, please?

Judge McDermott: Mr. Sato, would you read that question back to Mr. Frankel, please?

(Question read back.)

Q. Will you answer that?

A. That is a very broad question. I would like to—I will be as succinct as I may.

Q. Just answer the question.

Could anyone in your organization or your organization [fol. 945] itself?

A. You said in the world, sir, and that was the specific question.

Q. I will rephrase that, and I am glad that you called to my attention the broadness of the question, and I will be specific.

Could you or anyone in authority in your corporation, or your corporation itself, have forced Mr. Jacobellis to show the movie, "The Lovers," if he chose not to do so?

A. Yes, I believe that we could.

Q. Did you force the manager in Memphis, Tennessee, to make deletions?

Mr. Kleinman: Objection, if the Court please.

Mr. Terrell: We are going far afield now.

(Conference of the three judge panel held at this time.)

Judge McDermott: Court feels he should be made to answer.

The Witness: May the question be read?

Judge McDermott: Yes. Mr. Sato, would you read the question back, please?

[fol. 946] By Judge McDermott:

Q. Yes or no?

A. Definitely not.

By Mr. Osborne:

Q. Now, if Mr. Jacobellis did not want to show the film, how could you or anybody in authority within your organization, or the corporation itself, force him to show it?

Mr. Kleinman: Objection.

(Conference of the three judge panel held at this time.)

Judge McDermott: He has answered that they could make the manager do it, and in view of that we will overrule the objection. No one could make him commit a crime.

Mr. Kleinman: Objection, and that is just the point.

Judge McDermott: He has said that he could force him to show that picture.

Q. Will you tell us how you could force Mr. Jacobellis to show that film?

A. Sir, that would be up to my counsel to devise ways and means of forcing him to do so; and, obviously, if that were not permitted by the municipality, why I could not force him to do so.

* * * * * * *

[fol. 1001]

DEPOSITION OF HOLLIS ALPERT

Judge McDermott: Proceed with the reading of the deposition.

Mr. Terrell: This is direct examination of Hollis Alpert [fol. 1002] by Mr. Schwartz.

"Q. Mr. Alpert, by whom are you employed?

"A. I am employed by the Saturday Review, and also by a magazine called Woman's Day.

In both cases as a contributor and contributing editor.

"Q. Prior to the time you became associated with the Saturday Review, could you give us a brief sort of biographical sketch, a dossier of your experience and activities?

"A. Yes. I began as a fiction writer, and had many short stories published in many of the magazines in this country. I was—I entered the Army as a private, was commissioned

second lieutenant, served in the European Theater; in combat was cited by the Intelligence Department—Department of Intelligence for my work there, and came back to a civilian life in which I devoted myself to a writing career, again fiction, reviewing of books for the Saturday Review, and became employed as an editor for the New Yorker [fol. 1003] magazine, fiction editor; and then was asked in 1950 to undertake—be one of the contributors to a movie department which Saturday Review was instituting.

"I did that, and I have been reviewing movies, writing articles on movies ever since for magazines as well as the Saturday Review, and have also continued my fiction writing career, and have had a novel published and will have another novel published.

"Q. What was the novel you had published?

"A. It was called, 'The Summer Lovers' and was published by Alfred A. Knopf, Incorporated. A new novel they are also publishing, out in a few months, is called 'Some Other Time.'

"Q. As to the other magazine to which you made reference, namely, the Woman's Day—

"A. Yes.

"Q. —what sort of writing do you do for that magazine?

"A. This is not necessarily so much a critical column as [fol. 1004] a column devoted to movies, happenings in the movie world, interviews with movie stars, directors, writers, and so forth. That is, as I said, a less critical column.

It attempts to impart information and to be entertaining as well.

"Q. Are you a member of any professional associations?

"A. Like what?

"Q. Well, are there, for example, writers' guilds?

"A. Well, not necessarily any guilds. I am a director of the McDowell Association, which runs a colony, a place for writers, composers, and painters. It is a public trust.

"Q. You have been reviewing pictures, I gather, for at least ten years; is that right?

"A. Yes.

"Q. You have written a large number of reviews, is that right?

"A. Reviews and articles, yes—well, in the hundreds.

[fol. 1005] "Q. During the year 1958, did you see a motion picture entitled The Lovers?

"A. I did.

"Q. Directed by Louis Malle?

"A. Yes.

"Q. Do you know Louis Malle?

"A. I have met him once.

"Q. Do you know anything about his background?

"A. I believe—

"Mr. Osborne: Objection. Necessarily predicated upon hearsay."

Mr. Osborne: I would like to renew that objection at this time, if the Court please.

Judge McDermott: Just a moment now, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: That objection is overruled.

Mr. Terrell: Continuing with the reading of the deposition:

[fol. 1006] "A. I do know something of his background, told me directly by Mr. Malle.

"Mr. Osborne: Objection.

"Mr. Schwartz: I assume we are taking all these things with the objections, and it will be presented to the Court.

"Mr. Osborne: Yes."

Mr. Osborne: I am now asking this Court for a ruling on my objection, if your Honors please.

Judge McDermott: Yes, you have that right.

(Conference held at this time of the three judge panel.)

Mr. Osborne: "I do know something of his background, told me directly by Mr. Malle."

We are objecting to that on the grounds of hearsay.

Judge Pincura: The last answer may remain, but we don't know what the next question is.

Mr. Terrell: Reading further from the deposition:

[fol. 1007] "The Witness: Do you want me to tell you?

"Q. Yes."

Judge Pincura: Will you read after that, if you will, please?

Mr. Osborne: Our objection is to the answer to this question, if the Court please.

Judge McDermott: Now, just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: Yes, we are agreed that it is hearsay, but the Court also feels that it should be read, and if it is necessary for it to be stricken the Court will make such a ruling, and it won't harm the thinking of the Court.

Mr. Terrell: Shall I read the answer?

Judge McDermott: Yes, so we can make our decision on that.

Mr. Terrell: The answer is:

[fol. 1008] "He is a very young man, only twenty-eight at the present time. I would say of an intellectual case of mind. This is from spending considerable length of time with him after the review was written. He studied at the Institute in Paris devoted to the film arts and techniques, rather academic kind of institution.

"I believe he functioned also as a motion picture director for some time."

"Mr. Osborne: Objection to the last statement."

Judge McDermott: Now, just a moment, gentlemen.

(Conference of the three judge panel held at this time.)

Judge McDermott: The last part of the answer will be stricken and disregarded, gentlemen.

Mr. Osborne: Would it simplify matters if I read my objections in their proper place?

Judge McDermott: Do that, will you, because sometimes they come late, and we might not be aware of the objection.

[fol. 1009] Mr. Osborne: All right; I will be governed accordingly.

Thank you, your Honor.

Mr. Terrell: Continuing further in the deposition:

"Q. The statement you say, 'I believe'—

"A. I may be.

"Q. In the law, the word—

"A. I see, I cannot use the words 'I believe.' Then I better withdraw that because I am not entirely sure whether it was Malle who did this. I know something that he told me about the compositions of the film and how done. I don't know if that is any point.

"I know enough about him to know that his aims were entirely sincere."

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Now, just a moment, gentlemen, and give us a chance here to confer.

[fol. 1010] (Conference of the three judge panel held at this time.)

Judge McDermott: The last part may be stricken, and the Court will sustain the objection.

Mr. Terrell: Now, reading further in the deposition:

"A. I know enough about him—well, I can't use the word 'believe.'

"Q. The objection is made. You go right ahead. The judge not being here, Mr. Alpert, we are taking it, and the judge will rule on it.

"A. It is merely my opinion that his aims were sincere and artistic."

Mr. Osborne: Objection to that, if the Court please.

Judge McDermott: Just a moment, gentlemen.

(Conference of the three judge panel held at this time.)

Judge McDermott: Sustain the objection, and disregard that.

Mr. Terrell: Continuing further with the deposition:

[fol. 1011]. "Q. Do you know whether Mr. Malle had received any other awards for other pictures, or pictures other than The Lovers?"

Mr. Osborne: Objection, and based upon hearsay.

Judge McDermott: If he knows, and overrule the objection; but only if he knows.

Mr. Terrell: The answer he gives is:

"I am not sure. I know that he has received awards, but I am not sure just what categories they are in or by whom given."

Judge McDermott: The Court will let that stand.

Mr. Terrell: Thank you. The next is a question:

"Q. Is he a recognized producer of pictures?

"A. He is a recognized director. He made an earlier picture which was well received critically."

[fol. 1012] Mr. Osborne: I objected in New York. Withdraw the objection, Judge.

Mr. Terrell: He has withdrawn the objection.

Judge McDermott: Court thought that we would let that stand because we are not talking about The Lovers at that time, gentlemen.

Judge Pincura: Continue with the deposition, gentlemen.

Mr. Terrell: The next is a question:

"Q. Do you know Jeanne Moreau?

"A. Jeanne Moreau?

"Q. Yes.

"A. No, I do not; personally, I mean.

"Q. Yes.

"A. No.

"Q. Let me ask you this: Do you know whether the lady was a stage star before she took a part in the picture called The Lovers?

[fol. 1013] "A. Indeed she was. She has probably the greatest reputation of any actress of her age in Europe at the present time."

Mr. Osborne: Objection; not being responsive to the question.

Judge Pincura: That first couple of words has answered the question.

Judge McDermott: The latter part of the answer the Court will strike, and that is something that he added on, we feel.

Continue reading.

Mr. Terrell: The next is a question:

"Q. Do you know whether she enjoys a reputation of being a very fine actress?

"A. I do."

I notice there is another misspelled word here. They have reworing for rewording, I believe.

"Mr. Schwartz: I am rewording the question so that in the event the objection is based upon form, we can avoid it.

"Q. Do you know whether this particular film, The [fol. 1014] Lovers, has won any awards prior to its exhibition here in the United States?"

Mr. Osborne: Objection, as being based upon hearsay.

(Conference of the three judge panel held at this time.)

Judge McDermott: If he knows, he may answer.

Mr. Terrell: That answer he gave:

"A. I am not certain as to the awards.

"Q. Having seen the picture, do you feel that you can express any views as an expert with regard to its artistic quality?"

Mr. Osborne: Objection as to the form of the question.

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time among the three judge panel.)

Judge McDermott: Overrule the objection because we [fol. 1015] received the same kind of testimony in evidence already from other witnesses here.

Continue with the deposition now, gentlemen.

Mr. Terrell: I will start with his answer to that question:

"A. Being a critic, I naturally feel I can express such views, since it is my professional capacity to express them.

"Q. As an expert in the field, can you tell us what your view is with respect to the artistic quality of the picture, The Lovers?"

Mr. Osborne: I made an objection there while in New York.

I am now withdrawing that objection, for the record.

Judge McDermott: Will you pick it up again from the deposition?

Mr. Terrell: Yes.

"A. Shall I continue?

"Q. Yes.

"A. In spite of the objection?

[fol. 1016] "Q. Yes.

"A. Yes, the picture seemed to me to be one of mature emotional content, expressed in an artistic way with a sincerity of intention. It is naturally a story that is in the realm of fiction.

"It seemed to me as both a critic and a fiction writer that it was a quite valid story, artistically speaking. This does not mean it has to have any necessary relation with life as we know it. It can be completely in the realm of fantasy.

"Q. When you say a 'story,' isn't it a fact that this was a story not created by Mr. Malle, but was based upon a novel which had been written, shall I say, a couple of centuries before?"

Mr. Osborne: Objection, if the Court please.

Judge McDermott: We will confer for a moment.

(Conference held of the three judge panel at this time.)

Judge McDermott: Court will let him answer if he can.

[fol. 1017] Mr. Terrell: He can.

Judge McDermott: Continue reading his answer.

Mr. Terrell: The answer was:

"A. Yes, the novel was called Point de Lendemain. It is a well-known work of French fiction and served as the inspiration, let's say, for the screen play Mr. Malle wished to do."

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Court will let that stand.

Mr. Terrell: Continuing further:

"Q. Do you have any opinion, and would you care to express it, on the esthetic quality of this picture?

"A. I can only say that it struck me—"

Mr. Osborne: Show my objection, if the Court please.

Mr. Terrell: "A. I can only say that it struck me as being [fol. 1018] of the highest esthetic quality. I find 'esthetic quality' as such difficult to define, but if we will admit an understanding of the term between us, it seems to me that it is far above average of the usual run of motion pictures.

"Q. With respect to the photography and the technical aspects of this picture, would you say it was an excellent production?"

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: He may answer as an expert, so-called, and so identified here.

Continue.

Mr. Terrell: His answer to that was:

"A. Well, that would have to be qualified. This was a picture that was made on a relatively low budget compared to, let's say, Hollywood standards."

Mr. Osborne: Objection as being based upon hearsay.

[fol. 1019] (Conference of the three judge panel held at this time.)

Judge McDermott: Strike that out, and that is not responsive to the question anyway.

Continue with the deposition, gentlemen.

Mr. Terrell: Continuing further in the deposition:

"A. Within those limitations, it seemed to me the quality of the photography was very high and of a sensitive order.

"In terms of the technical nature of the film quality, reproduction itself, that is another matter."

Judge McDermott: We will let that answer stand.

Mr. Terrell: Thank you, Judge. Continuing further:

"Q. Mr. Alpert, the reason I am asking the questions, as you may know, I am trying to lead up to the point, was this [fol. 1020] a cheap bit of photography catering to prurient interests?"

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Objection is overruled.
Continue reading.
Mr. Terrell: Continuing in the deposition:

"A. No, not at all.

"Q. Having seen this picture and having seen innumerable other pictures, is it your opinion that this does not cater to the prurient interests?"

Mr. Osborne: Objection, if the Court please.
Judge McDermott: Objection is overruled.
Continue.
Mr. Terrell: Continuing reading:

"A. It is my opinion that it does not. I have seen many [fol. 1021] pictures which seemed to me to cater to prurient interests. I will be glad to name names. Like Ben-Hur."

Mr. Osborne: There was an objection at the New York deposition, but we will withdraw that objection at this time, if the Court please.

Judge McDermott: All right, Mr. Prosecutor.
Continue.
Mr. Terrell: Reading further in the deposition:

"Q. Did you find anything lustful or lascivious in this picture?"

Mr. Osborne: Objection, if the Court please.
Judge McDermott: Just a moment now, gentlemen.

(Conference held of the three judge panel at this time.)

Judge McDermott: The objection is overruled.
Judge Pincura: Judge McMahon has a point that where the State has withdrawn its objection, that should be so [fol. 1022] indicated in the record.
Judge McMahon: Will the record so show.
Mr. Osborne: On the question, "Did you find anything lustful or lascivious in this picture?" I raised an objection in New York, and at this time I wish the record to show that I am withdrawing the objection to that question.
Judge McDermott: Continue reading the deposition, gentlemen.

Mr. Terrell: The answer to that question was, No.

"Q. Did you find anything lewd in the picture?
"A. No."

Mr. Osborne: I raised an objection in New York, and now I wish to withdraw that objection.

Judge McDermott: The record may so show.

Continue reading.

Mr. Terrell: Continuing:

"Q. You wrote a review of this picture, did you not, in [fol. 1023] the Saturday Review?

"A. Yes.

"Q. I show you a copy of the August 8, 1959, issue of the Saturday Review, page 24, and ask whether you wrote the article contained in the two columns at the bottom of which is your name, Hollis Alpert?

"A. I did.

"Q. Have you had any reason to change the views which you expressed therein regarding the picture, The Lovers?

"A. None whatever.

Mr. Osborne: Objection, if the Court please.

Mr. Terrell: Then the witness states:

"May I add something?
"Q. You wish to add something?"

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

[fol. 1024] Judge McDermott: He gave his opinion in the review, and he cannot add at this time.

Mr. Terrell: May I read this, your Honor?

Judge McDermott: It doesn't add anything. Don't clutter up the record.

Mr. Terrell: Very good.

Judge McDermott: Continue with the deposition.

Mr. Terrell: Following that is the answer:

"A. I went back after writing the review to see the picture again, and my opinion after seeing it the second time was unchanged.

"Q. You say you went back to see it again. Can you tell us what was the occasion for doing that?"

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection.

[fol. 1025] Mr. Terrell: Continuing with the deposition:

"A. Very simply, my wife wanted to see it.

"Q. Then you have seen the picture twice?

"A. That's right.

"Q. Upon seeing it the second time, your opinion as expressed in this article remains unchanged?

"A. It does."

Mr. Osborne: Objection was made at the time of the New York deposition, but I will now withdraw the objection that I made at that time.

Judge McDermott: Let the record show that now.

Continue reading.

Mr. Terrell: Continuing with the deposition:

"Mr. Schwartz: I offer the article in evidence.

[fol. 1026] "(Article contained in August 8, 1959, issue of Saturday Review, page 24, by Hollis Alpert, was marked Defendant's Exhibit 1 in evidence, as of this date.)"

Mr. Terrell: With the Court's permission, I would like to make this as an exhibit in this case, and I believe that we are up to Defendant's Exhibit E, and—

Judge McMahon: The last exhibit for the defense is G; isn't that correct, Mr. Reporter?

The Reporter: One moment, please, while I check the master list.

Yes, your Honor, that is correct, Defendant's Exhibit G is the last we have in the record.

Judge McMahon: Go ahead, Mr. Terrell.

Mr. Terrell: I stand corrected; and would like to make this Defendant's Exhibit H, consisting of the Saturday Review of August 8, 1959, and Defendant's Exhibit H-1 will be the article within this issue of the magazine.

I now offer Defendant's Exhibit H and Defendant's Exhibit H-1 for identification.

[fol. 1027] (At this time, the Saturday Review, August 8, 1959, issue, was marked for identification as Defendant's Exhibit H and Defendant's Exhibit H-1.)

Mr. Terrell: At this time may we state that Mr. Alpert read the review because that is the purpose of his identifying the same, and he said that his opinion wasn't changed.

Mr. Osborne: Just a minute now, and the basic question about its admissibility has not been decided, and it hasn't been for the record.

Judge McMahon: It hasn't been received in evidence.

Judge McDermott: Just a moment now.

(Conference held at this time of the three judge panel.)

Judge McDermott: The Court feel that these should not be received formally until the State has had a chance to cross-examine.

For the record, you are offering them now, but the Court [fol. 1028] hasn't made a ruling on these exhibits.

Mr. Terrell: I would like to have him read, because he doesn't go into a breakdown of the picture as we have had the witnesses do here, and he stands on his critic's review, and that is his opinion of the picture.

Judge Pincura: Does the deposition taken in New York indicate that your witness in New York read this article?

Mr. Terrell: No.

Mr. Osborne: That is the point, Judge, and that is right, and the article in question wasn't read then.

Judge Pincura: You are now disclosing testimony taken at the time that this deposition was taken; and, if he did not testify to this Saturday Review article at that time, at the time of the deposition, I don't see how you can do it now for him. I just can't see that.

Judge McDermott: Was there an objection made at that time, at the time the deposition was taken?

[fol. 1029] Mr. Osborne: Yes, your Honor, an objection was made at that time.

Judge McDermott: Sustain the objection.

Mr. Osborne: No, because the one in charge of the deposition was without authority to make a ruling.

Mr. Kleinman: But there is no objection to that in the deposition!

Mr. Terrell: If the Court please, on page 16, Mr. Schwartz said that we offer this article in evidence, the Saturday Review, and that was marked for identification at that time as Defendant's Exhibit 1, and there is no objection to that in the record, at the time the deposition was taken, and then we have the following question immediately following his offer:

"Q. Did a time come later in the year when you chose this film as one of the best ten of the year?"

Apparently, we don't have any objection on page 16 regarding the offer of this exhibit in evidence.

[fol. 1030] Mr. Osborne: It was to be determined by this Court, and the only thing that the reporter shows is that the Saturday Review in question was marked for identification, and that is all.

Mr. Terrell: Well, Tom, Mr. Schwartz offered that article in evidence, and that is very clear here on page sixteen, and you can see that for yourself here, the remark by Mr. Schwartz.

Mr. Osborne: But it wasn't accepted into evidence, and by agreement the determination was to be made by this Court.

Judge McDermott: Just a moment, gentlemen.

(Conference of the three judge panel held at this time.)

Judge McDermott: Court will let that be read for what it is worth, having in mind that the Court may re-evaluate its right to be in the evidence later on.

Mr. Terrell: Thank you.

Mr. Osborne: Just a minute.

[fol. 1031] Judge McDermott: Subject to be stricken later.

Mr. Osborne: All right, but for the record I want to say that I am certainly not attempting to overrule the Court, but it wasn't read in New York, and it wasn't accepted into evidence in the State of New York, and it was marked only for identification at that time, when the deposition was taken in New York.

Now, Mr. Alpert was there, physically able, and could well have testified as to what his opinion of the film was; and

merely saying amen to something that appeared in the Saturday Review does not substitute for testimony.

Judge Pincura: We agree with you, and I think this branch of the Court had that in mind.

However, Judge McDermott and Judge McMahon would like to see what all the testimony is at the conclusion of this one witness, and if we feel that it is still then competent we will leave that in; but, if we feel that it isn't [fol. 1032] competent, we will strike that at that time.

Mr. Osborne: Thank you, your Honor.

Mr. Terrell: Thank you.

Shall I read the article in the Saturday Review at this time?

Judge McDermott: Now, just a moment, gentlemen.

(Conference of the three judge panel held at this time.)

Judge McDermott: Yes, you may read that into the record, Mr. Terrell.

Mr. Terrell: Thank you.

Judge McDermott: Let us take a short recess first.

(A short recess was held at this time to take care of some other court business.)

[fol. 1033] Judge McDermott: You may proceed to read that review into the record at this time.

Mr. Terrell: I now read from the Saturday Review issue of August 8, 1959, page 24, which contains the review of the motion picture, The Lovers, written by Hollis Alpert:

"Love Story.

"Louis Malle, a French director who only recently celebrated his twenty-seventh birthday, has caused a considerable stir in Paris with 'Les Amants,' which will open here shortly as 'The Lovers.' The reason for the excitement is clear enough. Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair; he has kept, it seems to me, within the bounds of good taste; and, at appropriate moments, he has been entirely explicit about certain of the more sensuous aspects of love.

"Something of a sexual revolution appears to be going on in the cinema, and Malle may well be one of its prophets.

[fol. 1034] He seems almost frighteningly knowledgeable about the nature of physical passion, and, more important, he has found a way to be expressive in a medium which, for half a century, has been a prisoner of convention when it came to dealing with its favorite subject matter: the varieties of love.

"Malle, who is the author of the screenplay as well as its director (it was taken from a novel, 'Point de Lendemain'), had the assistance of that clever, subtle writer, Louise de Vilmorin, on the always spare and unsentimental dialogue. Malle received his training while working with Jacques-Yves Cousteau and Robert Bresson, and it is possible to see the latter's influence, particularly. There is the same ring of truth, a similar poetic realism.

"The story itself is a simple one; it is about a married woman of thirty, highly civilized, who finds herself suddenly, startlingly, transformed into a creature of love. The spark occurs under seemingly innocuous circumstances, [fol. 1035] when her car stalls on the road from Paris to Dijon, she is helped by a young archaeologist, who drives her to her country home. In a matter of hours her well regulated life is at an end. From there on it is only love and uncertainty.

"But the telling of this story is a poem, a picture, about love, about the banked fires that lie within an individual. The face of Jeanne Moreau flawlessly mirrors the transformation of the woman. It is a cool, well-bred face that we see at first, the corners of the lips turned down in boredom and faint desperation. The eyes are quiescent, disappointed, but one senses that something wild lurks behind them, waiting for an awakening. The woman has had a cold, frustrating marriage, a child well looked after by servants and nurse-maids. Her husband is overly occupied with his work, and when he approaches his wife it is less with ardor than with jealousy. The jealousy is well founded enough, for she has found herself a lover in Paris, a polite, [fol. 1036] athletic, empty-headed rich bachelor. He helps fill the emptiness, alleviate the boredom. But she becomes as impatient with him as with her husband.

"The young man who has aided her is invited to spend the night by the husband; both find themselves walking alone

in the moonlight, and they meet—and it is at this point that Malle becomes most evocative. There is silence as they walk through a misty landscape, as they slowly turn towards each other for the answer to emptiness. There is a casting off of reserve, and their discovery of their need for each other. It is in these terms that the story is told, and one must compliment Malle for the way he avoids those moments that might cause the tell-tale sniggers of embarrassment in the audience. It is the always evident sincerity and seriousness, which protect against the sleazy, and the sensational.

"Lovemaking there is, and it is as explicit as anything ever done before on the screen, but one senses that it is not [fol. 1037] shown for the sake of providing a cheap, vicarious thrill, but so that we may be privy to what Malle obviously considers the most meaningful and symbolic moment in the lives of two people. I was reminded of a story by de Maupassant called 'Moonlight,' in which a priest watches a girl and a boy commit what in his eyes must be an act of sin, and yet he does not disturb them, but walks away with the sense that he has, after all, seen the inscrutable workings of God.

"In 'The Lovers,' Malle has come close to seizing the ineffable. He makes acceptable, too, the fact that these lovers must leave their previous lives, and regardless of all the conventions they live by, set out together on another road. To do this in such a way that we are not shocked, but convinced, strikes me as a notable achievement.

"Does this mean that Malle is not only condoning adultery, but approving this well-known crime against society? Not at all; he has told a story as he has seen it, and fol- [fol. 1038] lowed it to its inevitable conclusion. The judgments, I fear, are up to us."

Mr. Osborne: Are you through reading?

Mr. Terrell: Yes.

Mr. Osborne: I wish to renew my objection for the record.

Judge McDermott: You may have an exception.

Mr. Osborne: Thank you.

Judge McDermott: Proceed with the deposition, gentlemen.

Mr. Terrell: The next question in the deposition:

"Q. Did a time come later in the year when you chose this film as one of the best ten of the year?

"A. Yes."

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Just a moment, gentlemen.

(Conference held at this time among the three judges.)

[fol. 1039] Judge McDermott: The objection will be overruled.

Proceed.

Mr. Terrell: Reading further from the deposition:

"Q. When I say 'this film,' I mean The Lovers, of course; you understand that?

"A. Yes.

"Q. Tell me, how was this done and what factors did you take into consideration in listing or selecting The Lovers as one of the ten top pictures of the year?"

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: The objection is overruled.

Continue reading.

Mr. Terrell: The answer to that is:

"A. Well, it is very simple. My colleague on the Saturday Review is also—who shares the film responsibilities—

[fol. 1040] "Q. What is his name?

"A. Arthur Knight. He shares the film responsibilities with me. We meet once a year over lunch and bring lists of all the films we have seen during the year, and through a kind of winnowing out process come to those ten, or more, in some cases, that—which impressed us most during that year.

"In the case of The Lovers, we both agreed that it was one of the ten most impressive productions, film productions, of the year.

"Q. What were the factors that you took into consideration, or what grounds entered into your determination?"

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Now, just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: Objection is overruled.

[fol. 1041] Judge McDermott: Proceed, Mr. Terrell, with the reading.

Mr. Terrell: Continuing:

"A. The factors had to be discussed in this case, because it was an unusual film. So I can state what the factors were that we took into consideration.

"Q. Will you please do so?

"A. Yes—

Mr. Osborne: Objection, if the Court please.

(Conference held at this time of the three judge panel.)

Judge McDermott: You may answer.

Mr. Kleinman: The answer to that:

"We felt the movie tended to break new grounds in the treatment of love on the screen. May I take a moment to explain that?"

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: You may answer.

[fol. 1042] Judge McDermott: Continue with the reading, gentlemen.

Mr. Terrell: The next is a question:

"Q. Will you please?

"A. We both felt that a cliche attitude about love and, shall we say, the sexual experience of human beings has developed in the film medium over many years, based upon adolescent concepts, cheap fiction concepts, popular magazine concepts; that these tended to form a kind of cliche treatment of the subject, and that Mr. Malle with The Lovers was attempting to break through into a more honest and a more meaningful treatment of the subject of the love relationships between a man and a woman, in this case, both reasonably mature.

"It seemed to us that he did this with unusual sensitivity, that he avoided a good many of the cliches, and that, as a result, he made a movie which stimulated a good deal of controversy.

"Now, it did not seem to us that it was his deliberate [fol. 1043] attempt to stimulate controversy, but that he had set for himself an artistic goal, which he felt it necessary to follow through."

Mr. Osborne: I have a further objection at this time. The witness is testifying as to what somebody else thought or felt with specific reference to his testimony.

(Conference of the three judge panel held at this time.)

Judge McDermott: Let that stand for what it is worth.

Mr. Osborne: Judge, this wasn't predicated upon an article but predicated upon the testimony given at the deposition.

Mr. Terrell: I think that it might be explained that after the witness explained this that Mr. Osborne renews his objection, and I think that the Court should hear this.

"The Witness: We were talking about how we choose the ten best films, and in this case we agreed upon what had actually been achieved in our estimation by the film. [fol. 1044] "And that is about as far as our agreement on the subject went."

Mr. Osborne: I renew our objection at this time.

(Conference of the three judge panel held at this time.)

Judge McDermott: We are in a position to strike that later, and it may all be stricken later.

Continue.

Mr. Terrell: Going further:

"Q. Let me ask you this:

"In making the selection, and in dealing with the subject we just discussed, you took into consideration the artistic treatment?

"A. By all means.

"Q. The esthetic treatment?

"A. Oh, yes. You see, there are many, many films—

Mr. Osborne: Objection. There is no question before the witness.

(Conference of the three judge panel held at this time.)

[fol. 1045] Judge McDermott: Strike that out and sustain the objection.

Continue.

Mr. Terrell: The next question in the deposition:

"Q. In the course of your examination of films you have found many other films dealing with cliches, if you will, to which you referred, in one form or another?"

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Let him answer that.

Continue with the reading.

Mr. Kleinman: The answer was, "yes."

Mr. Terrell: The next question:

"Q. In dealing with The Lovers, you felt that this was handled beautifully and in good taste?"

Mr. Osborne: Objection, if the Court please.

[fol. 1046] (Conference of the three judge panel held at this time.)

Judge McDermott: He may answer.

Mr. Kleinman: The answer is:

"A. Yes. Beautifully and in good taste.

"Mr. Schwartz: That is all. Your witness."

[fol. 1047] Cross examination.

Mr. Terrell: I think maybe if Mr. Osborne asks the questions and Mr. Kleinman continues to act as Mr. Alpert, the Court can get the true meaning.

Judge McDermott: Mr. Osborne is the boss on that.

Mr. Stuplinski: I would rather not be Mr. Alpert, if you don't mind.

Judge McDermott: Proceed with the reading, gentlemen.

Mr. Osborne will read for himself, and will ask the questions, and Mr. Kleinman will give the answers as Mr. Alpert.

Mr. Osborne: All right.

"Q. Mr. Alpert, have you testified before by means of deposition in other matters involving the movie, The Lovers?

"A. Yes.

"Q. And when was that, and in what case?

"A. I would have to have my memory refreshed on the exact date.

"Mr. Schwartz: May the record show that, pursuant to [fol. 1048] a notice, Mr. Hollis Alpert testified on Thursday, January 21, 1960, in fact, in this very building, in a case entitled The State of Ohio against Alan Sherman Warth, defendant, Case No. 197261.

"Q. Is that your only testimony?

"A. Yes.

"Q. And that was the State of Ohio versus Warth?

"A. Yes.

"Q. And that was the date?

"A. Yes.

"Q. You testified that certain awards were received by Mr. Malle?

"A. I believe I did, yes.

"Q. Were you present when any of the awards were given?

"A. No.

"Q. You testified concerning the reputation of Jeanne Moreau?

"A. In that case?

"Q. No.

"A. Just now?

"Q. On your direct examination?

"A. Yes.

[fol. 1049] "Q. You testified concerning the reputation of Jeanne Moreau?

"A. Yes, I did.

"Q. Now, where does Jeanne Moreau live?

"A. Her abode is France. I don't know whether it is Paris. I believe she now has a country—

"Q. Have you ever lived in the same community that she did, while she was living in that community?

"A. No.

"Mr. Schwartz: I assume the question—My question on reputation did not deal with her personal reputation—not that I raise a question about it. But it dealt with her reputation in the field of art, drama, an actress. She was not a girl taken from the streets to play a part in a picture; she was an actress."

Mr. Osborne: I object to the remarks.

Judge McDermott: Yes; strike that out.

[fol. 1050] Mr. Osborne: You have pointed out certain typographical errors in this deposition.

Mr. Terrell: Do you want to amend them?

Mr. Osborne: Where they are obvious, as where the transcriber typed "feal" for "deal" and other obvious ones of that type.

Mr. Terrell: That is agreeable.

Judge McDermott: You make those corrections, Mr. Sato.

The Reporter: Yes, your Honor.

Judge McDermott: Continue with the deposition reading, gentlemen.

Mr. Osborne: I will continue reading:

"Mr. Schwartz: You raise a question as to her reputation.

"The Witness: Are you speaking of the moral reputation of Jeanne Moreau?

"Mr. Osborne: Just answer the question, please.

"The Witness: Well, I would like a clarification, though.

[fol. 1051] I don't understand the question.

"Q. You testified as to the reputation, on direct examination?

"A. As an actress.

"Mr. Osborne: Please.

"Mr. Schwartz: Professional reputation.

"Mr. Osborne: Please let him answer.

"Mr. Schwartz: Let me put the objection on the record.

"I object to the question as stating a fact not in evidence, and that had not been asked by me. My question related to the lady's reputation in the field of art, drama or entertainment. It had nothing to do with her personal life, about which we know nothing."

"The Witness: Nor do I.

"Q. Jeanne Moreau—what other pictures did she make, prior to The Lovers?

"A. I know she made other pictures. I cannot give you the exact title, but I do know that she was primarily known [fol. 1052] up to that time as a stage actress of high ability.

"Q. And you can't give any specific pictures that she made prior to The Lovers?

"A. No. My memory is not good on details of that kind.

"Q. Did you see any pictures made prior to The Lovers in which Jeanne Moreau appeared?

"A. Yes, I did. I saw a picture called Back To The Wall.

"Q. And when was that made?

"A. I believe that was made just prior to The Lovers.

"Q. And you base your testimony regarding her reputation upon that picture?

"A. No. Nor on The Lovers, necessarily, although she was—her acting was of an extremely high order in both pictures.

"But I had read some facts about Moreau, and I have talked to prominent directors about her, so that I was acquainted with the high esteem with which she was regarded in her professional field.

"Q. Do you believe that there is such a thing as obscenity? [fol. 1053] "A. Yes, I do.

"Q. And you say that this—do I quote you correctly—that it does not necessarily have any connection with life—and I am referring to your direct testimony.

"A. Not necessarily. Although, again, it can have a connection, but it doesn't—I was talking about the world of fiction, which does not necessarily have to have a direct connection with life itself, otherwise, we would all be prisoners.

"Q. We would all be what?

"A. All be artistic prisoners.

"Q. I don't understand.

"A. If we had to confine ourselves to simply writing to what actually occurred in life, we wouldn't be fiction writers.

"Q. I don't understand what you mean by artistic prisoners.

"A. I mean we would be confined to simply writing or reporting about the actual events of life as we observed it and witnessed it. In that sense you would feel somewhat [fol. 1054] imprisoned. Poetic license.

"Q. Pardon?

"A. It may have been poetic license; call it that.

"Q. When you and your colleague selected the ten best pictures of the year, how long did your luncheon conference last?

"A. From 12:30 in the afternoon until 3:00 o'clock in the afternoon.

"Q. And during that period of time you arrived at the ten best pictures of the year?

"A. Yes. But may I add that we had preliminary conferences about this particular task prior to this, over the telephone, on many occasions, in which we had begun our winnowing out process from obviously more than one or two hundred pictures.

"Q. I think I caught you correctly—and please correct me if I am wrong—that you were of the opinion that this movie, or Mr. Malle, the director, tended to break new ground in the field of love on the screen.

"A. That is my opinion.

[fol. 1055] "Q. And then, are you saying that this movie treated love differently from what it had been for some time?

"A. I would say not so much differently, because the experience of love is not all that. Very probably I would say extended the range of treatment hitherto given the subject on the screen.

"Q. Well, then, in that respect, would you say that The Lovers was revolutionary?

"A. I would say, not so much that The Lovers is revolutionary, but that it is one more example of a trend of

film making that is somewhat revolutionary toward this subject.

"Q. When you say tended to break new ground in the treatment of love on the screen, and I believe I caught your direct testimony correctly, or substantially correctly, would you tell us what you mean by that?

"A. Yes. I will attempt to. I would like to confine myself to the examples of films.

[fol. 1056] "For instance, there is a motion picture—

"Q. I will withdraw that question, sir.

"A. Yes.

"Q. You testified, on your direct examination, that a cliche had developed in the film medium with reference to the treatment of love; and what do you mean by the cliche which has developed, or had developed?

"A. Well, you have heard the phrase 'Boy meets girl, boy loses girl, and boy gets girl.'

"This has been one of the romantic or love patterns in movies for several generations. That is one cliche I can refer to.

"There is also the cliche of two lovers who meet, or become intimate under—unorthodox circumstances, let us say outside of marriage, are assumed to have sinned, suffer thereby, and are punished for it. This is a cliche.

"And we can probably cite many films which show this [fol. 1057] particular pattern. In other words, there are several hackneyed forms of treatment of the subject of love.

"There is also the jocular approach to love on the screen. The comedy of errors, the farce, the so-called bedroom farce, in which the husband is arriving at the door, the lover is leaving the other door, things of that sort occur constantly in movies. All tending to demean and cheapen—this is, again, a feeling—the genuiness of the love relationship between human beings, due to which we all, let us say, owe our existence in this very room, at this very moment.

"In other words, it seems to me that love is a deep and significant experience, perhaps the deepest and most significant that can occur to human beings.

"Q. Sir, may I direct your attention to the question concerning cliches?

"A. Yes.

"Q. I would ask you to address yourself to it.

"A. Yes. Well, I merely am saying that cliches of various [fol. 1058] kinds have developed about this most profound subject.

"Q. Would you say that, in The Lovers, Mr. Malle, through his production of The Lovers has gotten away from the cliches?

"A. Yes, to a degree.

"Q. And is that why it is artistic?

"A. Not necessarily at all.

"Q. Is that why it is beautiful?

"A. Not necessarily.

"Q. Are you acquainted with Jack Moffitt, a writer for the Hollywood Reporter?

"A. No.

"Q. With reference to movies?

"A. No.

"Q. Have you heard of him?

"A. No. I believe vaguely.

"Q. In what connection did you hear of him?

"A. I just vaguely heard the name. I haven't the faintest connection. I have heard of the Hollywood Reporter.

"Q. I want to read to you from his column in the Holly- [fol. 1059] wood Reporter of November 2nd, 1959, and ask you whether or not you agree with his statement.

"Mr. Schwartz: Off the record.

(Discussion off the record.)

"Q. 'Louis Malle, with his shadowy shots of the heroine's bare and bucking torso seems to have his mind more on a fast franc (and a trans-Atlantic fast dollar) than on any profound comment on human nature.'

Do you agree with that statement?

"A. Not in the least.

"Q. And reading further from Mr. Moffitt's column:

"'If this is a work of art, the old barroom ballad, 'Lil taught school when she first came West,' should rank with Milton; and the old song, 'But last night on the back porch I loved her best of all,' should be classified with Mozart.

"Do you agree with that statement?

"A. I can't make much sense out of the statement, but I don't agree with it. What sense I have gathered.

[fol. 1060] "Mr. Schwartz: For the record, I assume counsel will produce for the attorney in Ohio an exact clipping of this, because you are now reading obviously from notes, and—

"The Witness: I can help out here. I have read that particular review, I remember.

"Mr. Schwartz: I mean for the purpose of the trial. It is not that I raise any question about it, but in all fairness to you and the Court, the clipping itself should be available.

"Q. Are—"

Judge Pincura: For the record, it is available.

Judge McDermott: Let the record show that it is available.

Mr. Osborne: Yes, I have that, Judge.

Judge McDermott: All right. Let the record show that. We will take a short recess at this time.

(Recess.)

[fol. 1061] Judge McDermott: Let us resume with the reading of the deposition, gentlemen.

Mr. Osborne: Yes.

"Q. Are you acquainted with the reviews in Newsweek Reviews of the Movies?

"A. I occasionally read them.

"Q. I will read to you from Newsweek, the issue of September 21, 1959, and ask whether or not you agree with this statement.

"Mr. Schwartz: Again, this is subject to your producing the original, because taking a sentence out of context might not give us the entire story.

"Subject to your producing the clipping at the time of the hearing, I will except; otherwise, I raise objection to this question.

"Q. Referring to the movie, The Lovers:

"'It is a completely amoral tale, and it contains one of the longest and most sensuous love scenes to be seen in this country since Hector was a juvenile delinquent.'

[fol. 1062] "Do you agree with that statement?

"A. No. It is an overstatement as to the contents of the movie.

"Q. Are you acquainted, sir, with Mr. Stanley Kauffmann?

"A. Very well acquainted.

"Q. Writer for the New Republic?

"A. Yes.

"Q. And I refer to his criticism of December 7, 1959.

"Mr. Schwartz: I again object, for the purpose of the record, that there should be produced a copy of the original article in the New Republic, so that we can have the entire contents.

"Subject to that objection, which I am perfectly agreeable may be cleared up by the time this case is presented to the Court, let him answer."

Judge McDermott: New Republic, December 7, 1959, issue, has been marked as State's Exhibit 4, 4-A, and 4-B, and it is available here now.

Judge Pincura: That is correct; and we have had other [fol. 1063] testimony on that in this court.

Judge McDermott: Continue with the reading of the deposition.

Mr. Osborne: Yes.

"Q. Do you agree with the following statement, which I am quoting in abbreviated form, from—

"Mr. Schwartz: I object to it on the ground of it being an abbreviated form. Either you quote it directly, or don't quote it directly."

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule that objection.

Continue.

Mr. Osborne: Yes.

"Q. From Mr. Kaufmann:

"'The Lovers is in essence as silly a picture as I have seen in some time.'

"Do you agree with that statement?

"A. No.

"Q. Do you agree with this further statement of Mr. [fol. 1064] Kauffmann, in the New Republic of December 7, 1959—

"Mr. Schwartz: Again, subject to the objection heretofore made with reference to this particular article."

Judge McDermott: It is marked, and it is available. Overrule the objection for the record.

Continue.

Mr. Osborne: Continuing with the deposition:

"Q. 'We are asked to believe and to sympathize with the thesis that one satisfactory sexual encounter, presumably her first such, is enough to make the wife spurn her whole past as a wistful sham and go off with the young man who has brought her the Truth—Capital T—so pleasantly and quickly.'

"Do you agree with that statement?

"A. No. I believe it is an oversimplification of the subject matter of the movie.

"Q. Do you agree with this statement, this further state- [fol. 1065] ment in the New Republic of November 7, 1959:

"'The wisdom of the film is thus somewhat less than profound, and indeed is somewhat dated.'

"Do you agree with that statement?

"A. Not entirely.

"Q. Do you agree with his statement—that is, Mr. Kauffmann's statement, same date, same publication—

"Mr. Schwartz: Same objection."

Judge McDermott: Objection is overruled again for the reason that the article in question is here and available.

Continue.

Mr. Osborne: Continuing further with the quotation:

"Q. 'Malle's sense of statement is unreliable. He doesn't know when he's made his point and ought to move on.'

"Do you agree with that?

"A. No.

"Q. Do you agree with his further statement, in the same [fol. 1066] publication, of the same date:—

"Mr. Schwartz: Same objection, on the ground the clipping is not here and should be produced."

Judge McDermott: It is marked and is now available here. Objection to that is overruled.

Continue.

Mr. Osborne: Continuing with the quotation:

"Q. 'The climax, the love making, is detailed to the degree where the viewer either has to leave the theater so that the couple up there can be alone, or else giggle to render it make-believe so that he can stay.'

"Do you agree with that statement?

"A. No. No one left the theater while I was watching."

Mr. Osborne: I will object to that last statement as not being responsive to the question.

Judge McDermott: Strike that out as not being responsive.

[fol. 1067] Judge McDermott: Continue with the reading.

Mr. Osborne: Continuing with the deposition:

"Q. Are you acquainted with one Robert Hatch, a writer for the Nation?

"A. I know his name, yes.

"Q. I quote from his criticism in the Nation of November 28, 1959, and ask you whether or not you agree with these opinions.

"Mr. Schwartz: Before you actually quote him, I object on the ground that the clipping or issue is not available here for examination, and that, therefore, the question cannot be asked.

"There is no way of our checking the truth or falsity of the statement made, or the context in which it is used.

"In order to save time, I will object to all the questions along this line, so that I won't interfere with your examination."

Judge McDermott: The objection is overruled, for the same reason, as the magazine in question is here and available.

[fol. 1068] Judge McDermott: Proceed with the reading, Mr. Osborne.

Mr. Osborne: Yes.

"Q. 'Louis Malle is another in 'The new wave' of young French directors. On the evidence of The Lovers, Monsieur Malle is about 14.'

"Do you agree with that statement?

"A. No.

"Q. Do you agree with this—and I am still referring to Mr. Hatch's criticism in the Nation:

"'He is preoccupied with the sensation of sex at the involuntary level where satisfaction is the goal and the only relevant comment is clinical. He evades the consequences of sexual alliance, where competing responsibilities come into play and narrative becomes possible.'

"Do you agree with that?

"A. No.

"Q. And do you agree with Mr. Hatch's further statement:

"'It is very innocent to suppose that the way people [fol. 1069] make love is dramatically significant and very youthful to believe that the fact that they have done so makes a story.'

"Do you agree with that statement of Mr. Hatch?

"A. No, I don't.

"Q. Do you agree with this further statement, same publication, same date:

"'Reduced to projections of a sexual referee, the principles of The Lovers are remote, stiff, and objectively uninteresting.'

"Do you agree with that?

"A. No.

"Q. Do you agree with Mr. Hatch's further statement:

"'They, too, seemed childlike, because men and women and never that free of their own past. To be more specific,

when a woman walks out on a husband and child because a new acquaintance has roused and sated her, she pays some price for the change of alliance. If she pays no price, she is a moral idiot and unrewarding as a character of [fol. 1070] fiction.'

"Do you agree with those opinions of Mr. Hatch?

"A. No, I don't.

"Q. Do you agree with the further opinions of Mr. Hatch, same date, same publication:

"'It is no secret by now that The Lovers is visually erotic. Actually, there are two scenes of this sort occupying in all perhaps three minutes of the film. One is in a bathtub, that classic rendezvous of adolescent dreams; the other in a bed is so photographed as to isolate the woman during the moments of transport. The effect is to make of sex a solitary diversion instead of a union. Only the child mind falls into this egocentric distortion.'

"Do you agree with those opinions?

"A. No, I don't.

"Q. Are you acquainted with a movie critic of The Cleveland Plain Dealer by the name of W. Ward Marsh?

"A. No.

[fol. 1071] "Q. Do you agree with his reference to the movie, The Lovers, in the Cleveland Plain Dealer of November 13, 1959, as a 'stag movie'?"

Mr. Terrell: Mr. Schwartz at that point states:

"That is objected to upon the grounds, again, the clipping is not here, and there is nothing to warrant any information as to Mr.—whatever his name is—Marsh's position on the newspaper. Unless this evidence were introduced, I don't think it is fair to examine the witness. I, therefore, object.

"But you can answer it now."

Judge McDermott: They are here, and overrule the objection, because they have been marked for the record here. Continue.

Mr. Osborne: Thank you. Continuing further:

"Q. Do you agree with that reference?

"A. No. I think it is an utterly stupid remark.

"Mr. Osborne: May I have marked the column of W. [fol. 1072] Ward Marsh in the Cleveland Plain Dealer of Friday, November 13, 1959, page 36?

"(Page 36, Cleveland Plain Dealer, Friday, November 13, 1959, Column of W. Ward Marsh, was marked Plaintiff's Exhibit 1 in evidence, as of this date.)"

"Mr. Osborne: May the record show that it is handed to Mr. Schwartz.

"May the record show that the Plain Dealer article, Plaintiff's Exhibit 1, is being turned over to the witness for his perusal.

"The Witness: You would like me to read the entire article?

"Mr. Schwartz: May I ask counsel on the other side whether it is intended to call Mr. Marsh as a witness to be available for cross-examination based on the story he has written?

"Mr. Osborne: I am not in a position to answer that right now.

"The Witness: I have read this.

"Q. You have read Mr. Marsh's article?

[fol. 1073] "A. Yes.

"Q. Now, may I ask, sir, do you agree with his reference to the movie, The Lovers, as a stag movie?

"A. No.

"Q. Do you agree with his statement appearing in his column, referring to the movie, The Lovers, 'the prurient-minded will have a ball'?

"Do you agree with that statement?

"A. 'The prurient-minded will have a ball,' is that what he says, with this movie?

"Q. Yes.

"A. No. I think the prurient-minded would be bored by it. I don't agree with that. I think quite the opposite effect.

"Q. I wish you would read this from his column:

"'I have read out-of-town reviews by the so-called cognoscenti and the intelligentsia who have declared 'The [fol. 1074] Lovers' to be screen poetry. The verdict here: a dull picture until it turns to screen pornography, and then it becomes nauseous.'

"Do you agree with his statement that it is a 'dull picture until it turns to screen pornography, and then it becomes nauseous'?

"A. No, I do not. Mr. Marsh is making a statement, not about the picture, but about himself.

"Q. Do you agree with this statement appearing in his column that you have read:

"'Suppose for the moment I condone its pornographic sequences—which I do not!—there are other entirely destructive moral issues which are almost as unacceptable, or will be unacceptable to people who consider themselves as decent folk.'

"Do you agree with that statement?

"A. I hardly know what it means, frankly. I don't know whether I agree with it or not. I cannot interpret it.

"Q. Do you agree with his statement in the same column, that is, Mr. Marsh's statement:

[fol. 1075] "'By exhibiting 'The Lovers' the Heights Art'"—and he is referring to the Heights Art Theater—"'has done incalculable harm to all other theaters showing decent motion pictures.'

"Do you agree with that?

"A. No, sir.

"Q. Do you agree with this statement appearing in the column that you have read:

"'It will be a very great calamity when or if all other good, clean, honest, decent motion picture theaters have to atone for the curse which one theater can put upon them all.'

"And may I read it again, because I stopped in the middle, and I imagine I destroyed the continuity of thought:

"'It will be a very great calamity when or if all other good, clean, honest, decent motion picture theaters have to atone for the curse which one theater can put upon them all.'

"Do you agree with that statement?

[fol. 1076] "A. No.

"Q. Are you acquainted with a publication entitled Films in Review?

"A. Yes, I am.

"Q. Do you know of Henry Hart, a reviewer?

"A. Yes, I do.

"Q. And I believe editor of Films in Review?

"A. Yes.

"Q. Editor of Films in Review?

"A. Yes.

"Q. Have you read Films in Review for November, 1959?

"A. I am not certain. If you would show me the copy, perhaps I might tell you.

"Mr. Osborne: Would you mark this as Plaintiff's Exhibit 2 for identification?

"(Films in Review, issue for November, 1959, was marked Plaintiff's Exhibit 2 in evidence, as of this date.)"

"Mr. Osborne: Let the record show that I hand to Mr. Schwartz Exhibit 2.

"The Witness: Would you like me to read this?

[fol. 1077] "Mr. Osborne: Yes, please.

"(Handed to witness.)"

"The Witness: I have read this.

"Q. Now, Mr. Alpert, refer to the November, 1959, issue of Films in Review, and to the article beginning on page 561, written by Mr. Hart, of criticism of The Lovers, and I ask you whether or not you agree with these statements.

"A. May I ask you something: Was that written by Mr. Hart himself?

"Q. Yes.

"A. Because there is no name on it; is there?

"Q. It was written by Mr. Hart.

"A. This is something you have ascertained?

"Q. Yes.

"A. I see. I wasn't aware of that.

"Mr. Schwartz: We don't concede that, of course. For the purpose of the record, that is a statement you made,

[fol. 1078] but the statement you make doesn't make it so. In other words, for the matter of technical proof, you have to lay the groundwork for it.

"The Witness: I almost always disagree with everything Mr. Hart says, so I just want to make sure.

"Q. Do you agree with these statements appearing in Films in Review of November, 1959, entitled 'The Lovers':

"'It is pictures such as this that make the commercialism of Hollywood seem relatively wholesome.'

"A. No, I don't agree with it.

"Q. And this quotation:

"'The script of The Lovers is an unbelievable contrivance to lead up to one scene in which the camera records at length the facial reactions of a woman during cunnilingus.'

"A. I don't agree with that.

"Q. Do you agree with this statement:

"'Brahms, polo, a beautiful estate outside Dijon, and other socially acceptable divertisements, are used to lift The [fol. 1079] Lovers out of the class of 'smoker' pornography and into the class of pornography for 'cultivated' degenerates.

"Do you agree with that statement?

"A. No. You just want yes or no answers?

"Q. That is right.

"A. Yes.

"Q. Do you agree with this statement appearing in the same issue, the same publication:

"'They should be ashamed, as should everybody else connected with such low-grade, anti-social money-grubbing.'

"Do you agree with that?

"A. No, sir.

"Q. Are you acquainted, sir, with Paul Mooney, movie critic for the Cleveland Press?

"A. No, I am not.

"Mr. Osborne: Will you mark this as Plaintiff's Exhibit 3.

"(Column by Paul Mooney, Cleveland Press of November 11, 1959, was marked Plaintiff's Exhibit 3 in evidence, [fol. 1080] as of this date.)"

"Q. And Plaintiff's Exhibit 3 being a clipping from the Cleveland Press of November 11, 1959, a column written by one Paul Mooney.

"Mr. Osborne: May the record show that the witness is now reading the column, Plaintiff's Exhibit 3.

"The Witness: I have read it.

"Q. You have?

"A. Yes.

"Q. You mean just now?

"A. Yes, just now.

"Q. Do you agree with Mr. Mooney's statement in the column when referring to the candid camera work:

"'. . . it makes the second-rate French offering 'controversial' and, moreover, wholly objectionable as far as common decency is concerned.'

"A. No.

"Q. You do not agree with that?

"A. No, sir.

"Q. I am referring, sir, to the review referred to on your [fol. 1081] direct testimony appearing in the August 8, 1959, issue of the Saturday Review. And I refer to this section, sir:

"'In The Lovers, Malle has come close to seizing the ineffable. He makes acceptable, too, the fact that these lovers must leave their previous lives, and regardless of all the conventions they live by, set out together on another road. To do this in such a way that we are not shocked, but convinced, strikes me as a notable achievement.'

"You recall that, do you?

"A. Yes, sir.

"Q. You make the point, sir, that the movie is handled in such a way that we are not shocked; is that correct?

"A. I do."

(continued on next page)

[fol. 1082] "Q. In the light of that, sir, may I read to you from Mr. Paul V. Beckley's deposition in the case of the State of Ohio versus Warth, in the Dayton, Ohio, Police Court.

"Mr. Schwartz: What page?

"Mr. Osborne: Pages 292 and 293.

"Mr. Schwartz: That is not the deposition, that is an article that he wrote. It may have been marked in evidence in the deposition. Actually, it is not his deposition. It is the article that he wrote in the Herald Tribune, Sunday, November 8th. I will give you a copy which might make it easier for you. I am going to offer it later in evidence anyway.

"Mr. Osborne: But I am reading, sir. It is in the transcript of the Warth case, Proffer No. 2 (from the deposition of Paul V. Beckley).

"Mr. Schwartz: When you say 'proffer,' was the deposition actually put in evidence?

[fol. 1083] "Mr. Osborne: It was read into the record, but not accepted as evidence.

"May I refer to that copy?

"Mr. Schwartz: Surely.

"(Document handed to Mr. Osborne.)"

"Q. I refer towards the conclusion of the article as it appears in the New York Herald Tribune, Sunday, November 8, 1959. Referring to Mr. Malle:

" 'If he does not express his disapproval in a providential car crash as the lovers escape, he does manage to leave the viewer with a sense of shock, a sense of tragedy that is all the more affecting after the leisurely sensuousness of the early sequences and the sensual abandon of the latter.'

"Could you explain, sir, your opinion that in your statement in the Saturday Review:

" 'To do this in such a way that we are not shocked but convinced strikes me as a notable achievement'?

"Could you explain that in light of Mr. Beckley's statement?

[fol. 1084] "A. What did Mr. Beckley's statement have to do with mine? Is there any relationship between his statement and mine? I don't quite get it.

"Q. Sir, if you can answer the question, please do so. If you can't, please say so.

"A. Would you repeat the question, please?

"Mr. Schwartz: That is objected to as being incomprehensible.

"The Witness: I am afraid I don't understand the question.

"Q. Sir, you have stated that you saw the movie, The Lovers. What sex acts, if any, took place in the bedroom towards the end of the film?

"Mr. Schwartz: That is objected to.

"Q. When—

Judge McDermott: Just a moment now, gentlemen. There is an objection.

(Conference of the three judge panel held at this time.)

[fol. 1085] Judge McDermott: He may answer. Continue with the reading.

Mr. Osborne: Thank you.

"Q. When the woman and the archaeologist leave the grounds and go back up into her bedroom.

"Mr. Schwartz: That is objected to on the ground that the film is the best evidence of whether there is any such act or not, and what is portrayed in the minds of the person viewing it."

Mr. Terrell: There is an objection here.

Judge McDermott: Yes; just a moment now.

(Conference of the three judge panel held at this time.)

Judge McDermott: Overrule the objection.

Mr. Osborne: Continuing the reading:

"Q. Will you answer it?

"The Witness: Would you like me to answer it?

[fol. 1086] "Mr. Schwartz: Under the rules we have to. The objection is made.

"Mr. Osborne: May the record show that the witness just asked Mr. Schwartz—the witness said to Mr. Schwartz:

"Would you like me to answer it?"

"Mr. Schwartz: If any inference is sought to be drawn from the manner in which the witness asked me, I would like the witness on voir dire to say:

"Were you requesting permission from me, or were you asking for my indulgence?

"The Witness: I was asking—I don't quite get my—did I ask you a question?

"Mr. Schwartz: Were you doing me a favor by answering the question?

"The Witness: Heavens, no. Am I permitted to answer the question in view of the objection—

"Mr. Schwartz: All right.

"The Witness: —as to what sexual acts actually I saw on the screen.

"Is this the question you asked me?

[fol. 1087] By Mr. Osborne:

"Q. No. What sexual acts, if any, took place in that movie?

"A. That is the question—

"Mr. Schwartz: Again, I will raise another objection on the ground that it assumes a fact not in evidence, and that the film is the best evidence of any such matter."

Mr. Terrell: May we have a ruling on that objection?"

(Conference of the three judge panel held at this time.)

Judge McDermott: The objection is overruled. Continue.

Mr. Kleinman: The answer to that last question:

"A. My memory is that I saw a man and woman on a bed, that they seemed to be at least partially unclothed. As to what actual sexual acts occurred, there was no direct evidence on the screen. An inference could possibly be made, based on one's own previous sex or marital experience, but [fol. 1088] I am not sure as to that.

"I did not make any such inferences, simply because it seemed to me Malle was attempting to describe, in cinematic terms, the poetry of what may have been a sex—actual sex experience, rather than the experience itself.

"Q. Did you infer that any sex acts took place from your seeing of the film?

"Mr. Schwartz: Did what?

"Q. Did you infer that any sex acts took place—

"Mr. Schwartz: That is objected to.

"Q. —from your seeing of the film?

"Mr. Schwartz: That is objected to for the purpose of this examination. What the witness inferred is wholly immaterial, irrelevant, and incompetent, except as he has expressed himself."

Mr. Terrell: There is an objection to be ruled on by [fol. 1089] the Court.

(Conference of the three judge panel held at this time.)

Judge McDermott: The objection is overruled. Continue.

Mr. Kleinman: The answer to that is:

"A. I would assume, in view of the story structure itself that some sort of sex experience did occur in that bedroom.

"Q. What sort of sex experience?

"A. That I wouldn't be able to say. I don't know. Because it was not made clear.

"Mr. Osborne: I have no further questions."

* * * * * * *

[fol. 1108] Thursday morning, June 2, 1960.

Judge McDermott: Gentlemen, are you ready to begin?

Mr. Terrell: If the Court please, we would like to resume with the reading of the deposition of Mr. Paul Beckley.

Judge McDermott: Proceed.

Mr. Terrell: Let the record show that we are reading the deposition of Paul Virgil Beckley, and that Mr. Terrell will act in the place of Mr. Schwartz, who was doing the interrogating of Mr. Beckley, and Mr. Kleinman will read the answers given by Mr. Beckley in that deposition; and Mr. Stuplinski will act as Mr. Osborne, and he will interpose his objections and interrogate as Mr. Osborne did in New York.

Judge McMahon: Stuplinski substituting for Osborne?

Mr. Stuplinski: Yes.

Judge McDermott: All right, gentlemen, let us proceed.

[fol. 1109] PAUL VIRGIL BECKLEY, residing at 70 Goshen Street, Elmont, Long Island, New York, having been first duly sworn by the Notary Public, was examined and testified as follows:

Direct examination of Paul Virgil Beckley.

By Mr. Schwartz:

Mr. Terrell: I will begin with the interrogation:

"Q. Mr. Beckley, what is your profession?

"A. Newspaperman, critic.

"Q. Are you employed by the New York Herald Tribune?

"A. I am.

"Q. That has a circulation of about what, would you say?

"A. Well, I haven't checked recently, somewhere perhaps a little short of 400,000.

"Q. And it is distributed in New York and throughout the United States?

"A. Yes.

[fol. 1110] "Q. You are now a movie critic for the New York Herald Tribune?

"A. Yes.

"Q. How long have you been a movie critic for the New York Herald Tribune?

"A. Roughly, two years—that is, as the movie critic. I have been criticizing movies longer than that.

"Q. Maybe it will help us if you give us sort of a background or dossier, because we are trying to convey to the jury your expertness in this field.

"A. Well, what do you mean by 'background'?

"Q. For example, how long would you say you have been criticizing movies?

"A. Well, actually, I have been criticizing movies in the Tribune since sometime, I think, in 1952.

"Q. You are now the movie critic. Who were you working with before that?

"A. Well, before that I had a number of duties, a number [fol. 1111] of jobs, and I was working as a movie critic, part—that is, there was a chief critic, and when they had more movies, in other words, than he wanted to cover in a given week, I got one or two or whatever—it depended on him. Also, when the man was on vacation, I took over his job.

"Q. How long were you on the Herald Tribune?

"A. Since 1942; sometime in June. I can't say exactly, but probably about the second week of June.

"Q. How did you start with the Tribune—what work did you do?

"A. As a reporter.

"Q. And before that were you working for the Kansas City Journal?

"A. Yes, went to work there in 1929; remained there until March 31, 1942; came to New York about a month later; worked for a month at the Associated Press here; and then went to work for the Tribune.

"Q. Have you written articles of your own other than newspaper articles, such as short stories?

[fol. 1112] "A. No. When you say 'written'—but I haven't had any published.

"Q. Have you had any published?

"A. No.

"Q. Are you connected with any of the trade or professional associations?

"A. Well, now, what do you mean? You mean as far as the movies is concerned?

"Q. Writers Guild?

"A. There is a newspaper guild, a union.

"Q. Yes?

"A. I am a member of that.

"Q. Mr. Beckley, in the course of your duties as the motion picture critic for the Herald Tribune, did you during the year 1959 view a motion picture entitled The Lovers?

"A. Yes.

"Q. Directed by Louis Malle?

"A. Yes.

"Q. Before I get into that, I want to make sure of one thing:

"You have no connection with the defendant in this [fol. 1113] case, whose name is Nico Jacobellis?

"A. No.

"Q. You don't know him at all?

"A. I won't swear to that. I don't know whether I have met him. But I don't recognize the name.

"Q. Did you ever talk with me before today—

"A. Again—

"Q. —in connection with this case?

"A. Well, not that I know of.

"Q. When the picture The Lovers opened in the Paris Theater, did you write a review, which was published in the Herald Tribune?

"A. Yes, I did.

"Q. I show you a photostatic copy and ask you whether that is a copy of the review?

"A. October 27, 1959, Tuesday; yes, this is.

"Mr. Schwartz: Is there any objection on the ground [fol. 1114] that it is a photocopy?

"Mr. Osborne: We don't have any objection on that.

"Mr. Schwartz: I show you the original, and that is a photocopy.

"Mr. Osborne: All right.

"Mr. Schwartz: I will offer the photocopy in evidence.

"Mr. Osborne: We will object.

"(Photocopy of review of The Lovers in the Herald Tribune, dated October 27, 1959, was received in evidence and marked Defendant's Exhibit 3.)"

Mr. Stuplinski: We will object, if the Court please.

Judge McDermott: Are you speaking of the New York version?

Mr. Terrell: Apparently so, your Honor.

(Conference of the panel of three judges held at this time.)

Judge McDermott: Let that in for what it is worth.

Mr. Osborne: So that we understand, is the Court ac-
[fol. 1115] cepting into evidence copy of the criticism in the newspaper under discussion?

Judge Pincura: Yes, with this explanation:

There has been testimony of a New York censored version of the movie entitled The Lovers.

Mr. Osborne: Yes.

Judge Pincura: And this comment goes to the New York version. We will admit that as to the New York version for what it is worth.

Judge McMahon: Now, with reference to the photocopy of the review—

Mr. Osborne: Yes, and we agreed to the photocopy being admissible if it is admissible, and we will stay with that position.

Mr. Terrell: We have one of the originals taken from the October 27th issue of the New York Herald Tribune, and I think that we will have this marked for purposes of identification as Defendant's Exhibit J at this time,
[fol. 1116] Mr. Terrell: Pardon me. With the Court's permission, we will introduce Defendant's Exhibit J at this time and leave that in evidence.

Judge McMahon: Originally the New York Herald Tribune article was marked as Defendant's Exhibit 3, and it is now marked as Defendant's Exhibit J?

Mr. Terrell: That is correct, for the record.

Judge McDermott: All right, gentlemen, let us proceed.

Mr. Terrell: The next question in the deposition:

"Q. You wrote this article after you had seen the picture, is that right?

"A. That's right.

"Q. And thereafter you wrote another article about the same movie, did you not?

"A. That's right, I wrote a piece for the Sunday paper —drama section of Sunday.

"Q. I show you what has been marked as Defendant's [fol. 1117] Exhibit 3, and ask you if that is the photocopy of the article you wrote for the Sunday section on November 8, 1959?

"A. Yes, it is. It wasn't all on one page.

"Q. Do you have the picture clearly in your mind?

"A. Well, now, it depends on what you mean.

"Q. With respect to your views as to the picture.

"A. I mean, I have seen probably fifty, maybe more, since that time. As to individual incidents and so forth, I may not be able to see them photographically in my head, the general tone or tenor—there have been many of the individual pictures I can recall.

"Q. Having seen the picture, with your background and experience, are you able to express an opinion, for example, on its artistic and esthetic quality?

"Mr. Osborne: Objection."

Mr. Stuplinski: If the Court please, we will withdraw [fol. 1118] the objection at this time.

Judge McDermott: You are withdrawing it?

Mr. Stuplinski: Yes.

Judge McDermott: Let the record show that.

Proceed, gentlemen.

Mr. Terrell: The following question:

"Q. Referring to the picture, The Lovers?

"A. Yes, I should think so.

"Q. Now, will you tell us what your opinion is?

"Mr. Osborne: Objection."

Mr. Stuplinski: If the Court please, we will withdraw our objection.

Judge McDermott: You are withdrawing the objection?

Mr. Stuplinski: Yes.

Judge McDermott: Let the record show that you have withdrawn it.

Proceed with the answer to that question, Mr. Kleinman.

[fol. 1119] Mr. Kleinman: The answer to that question:

"A. I think it is a very good film, artistically speaking.

"Q. Do you think this is a film that caters to the prurient interests?

"Mr. Osborne: Objection."

Mr. Stuplinski: There is an objection, if the Court please, and we renew it at this time.

(Conference held at this time of the three judge panel.)

Judge McDermott: The Court will let that be admitted and received, thinking of the New York version, however.

Mr. Osborne: If the Court please, the Court should have in mind that this man wasn't acquainted with the contemporary community standards of Cuyahoga County and its effect upon the average person.

Judge Pincura: Court will keep that in mind.

Judge McDermott: But let it be received otherwise.

[fol. 1120] Judge McDermott: You may answer that question, Mr. Kleinman.

Mr. Kleinman: The answer to that question:

"A. I beg your pardon. I don't know what 'prurient' means.

"Q. Do you think it is a lascivious film, for example?

"Mr. Osborne: Objection."

Mr. Stuplinski: We are renewing our objection at this time, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: The objection is overruled.

Proceed, gentlemen.

Mr. Kleinman: The answer to that question:

"A. No; not as such.

"Q. Do you think it is lustful or lewd?

"A. I don't think it was intended to be such, no.

[fol. 1121] "Mr. Osborne: Objection."

Mr. Stuplinski: We renew our objection at this time, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Sustain the objection.
Mr. Stuplinski: We move to strike that answer.
Judge McDermott: Yes, strike that answer.
Proceed, gentlemen.
Mr. Terrell: Reading further:

"Q. Do you have any knowledge as to any awards which were won by this film prior to its presentation here in the United States?

"Mr. Osborne: Objection."

Mr. Stuplinski: There is an objection here, if the Court please.
Judge McDermott: If he knows, he may answer.
Mr. Kleinman: The answer given:

"A. No. As a matter of fact, I don't.

[fol. 1122] "Mr. Osborne: I withdraw the objection."

Judge McDermott: You withdraw it at this time?
Mr. Stuplinski: Yes.
Judge McDermott: Let the record show that.
Proceed, gentlemen.
Mr. Terrell: Continuing further, the next question:

"Q. Did you know that it had received an award at the Venice International Film Festival?

"Mr. Osborne: Objection, both in substance and in form."

Mr. Stuplinski: We are objecting, if the Court please.
Judge McDermott: If he knows.
Mr. Kleinman: The answer to that one:

"A. I don't know it. I don't recall at the present.
"Q. Are you familiar with the reputation, as far as ar-
[fol. 1123] tistry is concerned, of the director, Louis Malle?
"A. Well, in a general way because of this film, principally, I should say.
"Q. Has he made other films so far as you know?
"A. I think he has.
"Q. Does he enjoy a reputation as a good artist?

"Mr. Osborne: Objection."

Mr. Stuplinski: We are objecting, if the Court please.

Judge McDermott: If you know.

Mr. Kleinman: There is no answer in the deposition to that question.

Judge McDermott: Proceed with the next question, Mr. Terrell.

Mr. Terrell: Yes.

"Q. Good director?

"A. Yes.

"Q. How about Jeanne Moreau, who plays the part of the girl in this movie—do you know anything about her reputation as a stage star—

"Mr. Osborne: Objection."

[fol. 1124] Mr. Stuplinski: We have an objection, if the Court please.

Judge McDermott: Just a moment, gentlemen.

(Conference of the three judge panel held at this time.)

Judge McDermott: If you know.

Mr. Terrell: There is another part of that same question:

"Q. —or artist?

"A. Again, only insofar as her appearance in this film is concerned, and I think she is an accomplished actress.

"Q. Mr. Beckley, you have expressed various opinions in your review both of October 27th, which is Plaintiff's Exhibit 3, and also in the November 8th article, Defendant's Exhibit 2.

"Do those represent your views?

"A. They certainly do, at the time, and they probably do now. I haven't seen the film since.

"Q. Has anything occurred or have you read anything which leads you to believe that you were wrong in the [fol. 1125] judgments you then expressed with regard to the picture?

"Mr. Osborne: Objection."

Mr. Stuplinski: We have an objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Objection is overruled.
Let him answer.
Mr. Kleinman: The answer is:

"A. No, I have not.

"Mr. Schwartz: That is all. Your witness."

* * * * * * * *

[fol. 1182] Thursday afternoon, June 2, 1960

Thereupon, the defendant, in order to further maintain the issues on his part to be maintained, called as a witness EDWARD B. HENNING, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Edward B. Henning:

By Mr. Kleinman:

Q. Would you state your name, please?
A. Edward B. Henning.
Q. Where do you reside, Mr. Henning?
A. Cleveland Heights, 3325 Fairmount Boulevard.
Q. Would you state your present occupation?
A. Assistant to the Director, Cleveland Museum of Art.
Q. And how long have you been Assistant Director of the Cleveland Museum of Art?
A. One and one-half years.
Q. Prior to becoming Assistant Director of the Cleveland Museum of Art, what was your occupation, Mr. Hen-
[fol. 1183] ning?
A. Associate Curator of Education, Cleveland Museum of Art.
Q. Associate, did you say?
A. Associate Curator of Education.
Q. What was your occupation prior to that?
A. Before that, Assistant Curator of Education, and before that teacher at the Cleveland Public Schools.
Q. And how long were you a teacher in the Cleveland Public Schools?

A. Two years.

Q. Would you state what your educational background consists of.

A. Yes.

Graduated from the Cleveland Institute of Art, and Bachelor of Arts Degree from Western Reserve University; and Master's Degree from Western Reserve University in art history; and studied for one year at the Julian Academy in Paris; and have done subsequent graduate work toward Doctorate in Art History and Esthetics.

Q. Will you describe the duties that you have as Associate Curator of the Educational Division of the Cleveland Museum of Art?

A. In charge of the administration of the department of education, and I did considerable lecturing at that time, as [fol. 1184] I am still doing, and I taught at the Western Reserve University in the Department of Art and Art History, and I was also at that time supervisor of the film program at the Cleveland Museum.

Q. As Assistant Director to the Director of the Cleveland Museum of Art, will you state what functions you perform?

A. Again, I am in charge of a good part of the administrative duties of the Cleveland Museum of Art, and operate in many capacities.

I assist in organizing exhibitions of all kinds, and I am supervisor of the film program at the Cleveland Museum.

I am called upon to make frequent trips, and called into consultation on decisions to be made on the purchase of new work for the museum collection.

Q. Do you have anything to do with the selection of work to be purchased or exhibited at the Cleveland Art Museum?

A. Yes, I have.

Q. With reference to the motion picture field, what actually does that program consist of at the Cleveland Museum of Art?

A. Consists of a series of films which are presented on the lecture program at the Cleveland Museum, anywhere [fol. 1185] from 12 to 15 films over the course of the academic year.

The film programs are made up with an educational purpose in mind. We try to do a job of education in teaching

something about films as an art form, and usually a theme is decided upon, and film selected to fit this program, and preceded, of course—film is preceded by a short lecture on the qualities of the film, and occasionally by some discussion with the audience after showing of the film.

Q. Do you select these films?

A. I do in consultation sometimes with other members of the staff.

I am directly responsible for the selection, however.

Q. Will you state the standing of the Cleveland Museum of Art with reference to that of other museums throughout the country and throughout the world?

A. Well, I think that without any question it can be stated that the Cleveland Museum is one of the top art museums in the world.

In certain areas we are extremely strong and have a well rounded selection—rounded collection, and rank, I would say, below the great national collections, such as the Louvre, [fol. 1186] and the National Galleries of Washington, and ranks below the Metropolitan Museum of Art of New York, but on a level with those in Boston, Philadelphia, and so forth.

Q. In selecting works of art for the museum or the various film that you mentioned before, is it necessary for you to exercise certain discretion in connection with your selection?

A. Yes.

Q. And what discretion do you exercise in connection with them?

A. Well, of course, what we are mainly concerned with is the quality of the film as an art form.

A certain amount of discretion enters into the organization of this program.

Q. If I feel that an audience has been prepared, I would have no hesitancy about showing any film that I felt had great esthetic quality.

I would hesitate to show some films out of the blue and would not spring it on an audience with which I had no contact before. I could think of very few films which might be considered for our program of which this might be true, however.

Q. Now, the Cleveland Museum of Art, is that a public institute?

A. Private, but it is, of course, open and available to the [fol. 1187] public.

Q. You say that it is open and available to the public?

A. Yes.

Judge McDermott: Court will take judicial notice of that.

Q. Now, with reference to the selection of matter, that is, art pieces and films for exhibit or purchase by the Cleveland Museum of Art, is it necessary for you to make a judgment as to whether or not this material meets the contemporary community standard insofar as obscenity is concerned?

By Judge McDermott:

Q. Yes or no.

A. Yes.

By Mr. Kleinman:

Q. Would you state in what sense this judgment is exercised by you?

A. Well, when we view the work or the film, of course, we simply make judgment—

Mr. Osborne: Objection to the use of "we" and the Court has requested of this witness—

Judge McDermott: He is speaking for community projects, and let him say "we," and he is speaking for the [fol. 1188] Art Museum.

By Judge McDermott:

Q. Are you?

A. That is right.

Judge McDermott: Let him go ahead now.

By Mr. Kleinman:

Q. Continue your answer.

A. In viewing the films which we intend or propose to include on our program, we consider the community stand-

ard and have at all times as to what might be offensive to a large group of people, or to the audience specifically that we had expected to be attending this program.

Q. Is that true with other art pieces as well as with films?

A. I can think of no instance in which this question has come up in the purchase of paintings or sculpture.

Q. With particular reference to the motion picture film, "The Lovers," did you see "The Lovers"?

A. I did.

Q. Where did you see the film, and approximately when?

A. I saw the film in New York, I believe it was, about [fol. 1189] two months ago, and I saw it again in the viewing for the witnesses here in Cleveland.

Q. This second viewing was in the Twentieth Century-Fox screening room?

A. That is right.

Q. Was this as a result of the invitation from us to view the film?

A. Yes.

Q. Insofar as you know, it is the identical film which is at issue in this case?

A. Yes.

Mr. Osborne: I will object to that.

Judge McDermott: Overruled, and speaks for itself.

Q. You also said that you saw the film in New York City?

A. I did.

Q. Did you see the film in New York City before or after viewing it here?

A. I saw that before viewing that here.

Judge McDermott: Court is mindful of the New York film version compared with the one that is shown in Cleveland, and we have that in mind.

[fol. 1190] Q. Viewing the film in New York and again at the Twentieth Century-Fox studio, did you notice any difference in the two film studios?

A. No.

As a matter of fact, I had—

Mr. Osborne: You have answered the question.

Judge McDermott: Disregard that latter part and strike that from the record.

Mr. Osborne: Thank you.

Q. You have noticed no difference between the two versions?

A. None whatever.

Q. In view of your experience and training, do you have an opinion as to the artistic quality of the motion picture film, The Lovers?

A. I do.

Q. Would you state your opinion as to the artistic quality of The Lovers?

A. Yes.

I feel that it is a film of great quality, probably not one of the greatest films that I have ever seen, but certainly a superior quality as a film.

Q. Would you care to state further what you base your [fol. 1191] opinion on?

A. I would be glad to.

Q. Would you do so?

A. I have, of course, several ways of looking at a film.

Judge McDermott: Do it in your own way.

The Witness: Thank you.

A. First, then, I may say that technically I thought that the film, "The Lovers," was very beautifully handled from the standpoint of photography, particularly appropriate to the nature of the film.

The photography wasn't dramatic, but it was intimate and very direct, and intimate and realistic photography.

I felt that the editing of the film was particularly telling. For example, the inner rhythm of the film as sometimes quoted, or cutting of the sequences, and the development of certain regions of visual sequences in the film was particularly expressive.

Many people seem to feel that it was rather boring and that—

Mr. Osborne: Objection to what other people feel.

Judge McDermott: Strike that out of the record, and [fol. 1192] the Court will disregard that, and you are talking about yourself.

A. The early sections of the film and the interior rhythm of the film, the editing of these sequences was very slow in passing, expressive of the boredom I felt that we were apparently intended to feel about the home environment.

When during the showing of the film the camera went to Paris, the environment of these sequences were speeded up in rhythm, showing that the editor of the film had been very much aware of the power of the rhythm of these sequences to suggest certain moods, and certain qualities of the environment involved.

I feel that the handling of images was particularly fine. I recall for the Court that, for example, in the early part of the film, in the environment in the home and Paris, we never saw an expression on the lady's face, on Jeanne's face, of violent or any kind of strong emotions.

The most that we had seen was a faint smile throughout her trips to Paris and in the home environment, so that the image of her laughing a wholehearted laugh at the joke that the architect made as the architect drove her up to her home [fol. 1193] came as a sudden relief, and gave something of a forecast of her feelings to be in her new environment in the company of the architect.

This suggested in a very strong way, it seemed to me, the contrast between the dullness and boredom and rather stiffness of the tight control of this woman in the earlier environment, and the releasing of these tensions in the latter stages of the film.

There were many elements of this kind and were particularly telling technically, and I think—well, the plot of this film—for example, consisted of three main environments, the home environment represented by the figure of her husband, and the Parisian environment represented by the figure of her friend and also the playboy lover—

Judge McDermott: Polo player.

The Witness: Polo player, yes.

And the third environment was represented by the figure of the architect—

Mr. Terrell: Archaeologist, doctor.

The Witness: Excuse me, yes, the archaeologist.

It seems to me that the director of this film was faced [fol. 1194] with a very difficult problem, and he had three

environments, and the third figure, the archaeologist, entered the film only after a long time, and the film was probably halfway over before the archaeologist came into it.

Mr. Osborne: May I object, if the Court please.

Judge McDermott: You will have your cross-examination, and overruled as of now.

The Witness: These three environments the director of the film represented in the following ways:

You will remember that the husband and home environment was represented as one of some wealth and social prestige, and the husband was represented as being an intellectual and cultured man.

We get that from the library they had and the records that he obviously played, and the books which he obviously used, and I think this environment seemed to be lacking something very essential to a normal and happy relationship, and that is any evidence of warmth or of com- [fol. 1195] patibility between the two main figures, the husband represented as being aloof, cold, and distant.

I can, if you wish me to do so, take time to give evidence for each of these points in terms of the images of the film.

Q. Proceed further with your analysis of the artistic quality of the film.

A. I recall to the Court again the moment when she returned from a trip to Paris, and the husband listening to his records, and she made an effort to approach him, and his reaction was one of indifference, and I recall that on one occasion of any direct physical contact between these two people, that is, the one time that the husband made an effort to approach his wife physically, it was after a dinner party where he had been drinking heavily, and he made a rough, rude approach to his wife when she was in bed.

The second environment is that of Paris, and the lover was represented as having some of the qualities which were lacking at home, and in which the wife, Jeanne, seeked some relief from her boredom and her seeking an environment which offered her some excitement, gayety, romance, high fashion, and social whirl, and which lacked, however, [fol. 1196] any purpose, and it was a purely sensuous and superficial existence.

I say again that I think that the lady's attitude throughout this early part of the film and her lack of any emotion, one way or another, suggested that she was not emotionally involved in either of these environments.

The third major environment was the archaeologist and his automobile which comes into the film about halfway through, and offered, I believe, a great deal more than either of the previous two environments; and, in fact, offered what was needed by this woman for a happy and normal existence, and the character of the archaeologist was very clearly developed in a series of incidents, and this was a very difficult problem for the director of the film, and he had a very short time to establish the character of this man.

I recall to the Court the incident where the archaeologist stopped along the road to visit an old professor to return some books, and he prolonged his stay at the professor's home to stay almost an hour because his professor friend was ailing, and he hesitated to leave him, and he did not [fol. 1197] want to leave his presence because the professor was so pleasantly surprised at his visit. I submit that this suggested that this man's character was one of sympathy, human sympathy.

I recall also the discussion in the automobile about the social life which Jeanne was leading in Paris, and that it was revealed that the archaeologist had been born to this environment but that he had rejected that type of existence.

I submit also that his attitude of good humor as his journey progressed—finally the joke that he made as they pulled up the driveway toward their home, which sent her into gales of laughter, which, as I say, was a psychological relief from the tensions of the rest of the scenes.

Q. Do you recall any other scenes where the character of the archaeologist was brought out in the film?

A. I would like to think about it for a moment, if I may.

Q. Do so.

A. Yes. I remember during the evening when they were [fol. 1198] out strolling throughout the fields, I remember that he stopped and released some fish that had been caught in a trap which her husband had set, and I submit that he was attempting there to portray a spirit of freedom and that he didn't want any living thing in a state of captivity, and that was very beautifully done.

I submit further that he was obviously a man of learning and a man of culture.

I would say, then, to summarize, that the first environment, the home, and the husband offered a cold and indifferent—and coldness which left something lacking in the life of this normal woman.

The second environment, that of Paris, offered a superficial and somewhat sensuous existence.

The third environment, in the company of the archaeologist, she found compatibility, warm friendship, and the human sympathy which ultimately made a decision in her future mode of life.

Q. Would you say that what you have just said is the dominant theme of the picture, or could you in a very brief statement say what you consider to be the dominant [fol. 1199] theme of The Lovers?

A. Dominant theme is that love in a broad sense is a very powerful and very important element in a normal, well adjusted life.

Q. With particular reference to the so-called bedroom scene in the picture—

A. Yes.

Q. From an artistic point of view, could you state whether or not this was an integral part of the film and whether in your opinion it was necessary to convey the meaning to the audience?

Mr. Osborne: Objection, if the Court please.

(Conference of the three judge panel held at this time.)

Judge McDermott: Sustain the objection.

Q. How many motion picture films do you see in the course of a year?

A. Between 100 and 150, I would say.

Q. Are they domestic film or foreign film?

A. All kinds; domestic and foreign film.

Q. And have you observed with respect to motion picture films, both domestic and foreign, as to whether there is [fol. 1200] any, or has been, in the last ten years any change in motion picture films as regards the matter of sex?

A. Yes, I think it would be fair to say that—

Judge Pincura: He has answered that.

Judge McDermott: He has, and strike out the balance.

Q. Will you state what you have observed in this respect?

A. I think that it would be fair to say that American films have tended on the whole to deal more directly and honestly with this aspect, which foreign films normally did even in the past.

Q. Now, in your judgment as an expert in the field of art, do you have an opinion whether the motion picture film, "The Lovers," appeals to the prurient interest of the average man, applying contemporary community standards? Do you have an opinion?

By Judge McDermott:

Q. Yes or no?

A. Yes.

By Mr. Kleinman:

Q. Will you state what your opinion is in that respect?

[fol. 1201] A. I feel very strongly that the movie, The Lovers, does not appeal to the prurient interest of any normal human being.

Q. Could you indicate in particular with regard to the qualities of the film which you have just described anything which leads you to this conclusion?

A. I would like to say first, of course, that I have my own opinion based upon my own observation, and such conversation with other people whom I know and respect and have seen this film, and I would say this, that in my opinion a film of this kind that deals with a very important human problem and social problem in an honest and direct fashion does not appeal to the prurient interest, whereas other films which deal with them in terms of insinuation and implication, which skirt the edges, and skirt the edges of this problem, often take on the character, if I may say so, of off color stories; and I find The Lovers was very helpful and direct and very honest in its approach to a very important human problem.

Judge McDermott: There is no objection, and the an-

[fol. 1202] swer will stand for what it is worth along with all of the other testimony.

Mr. Henning, it has been suggested by the judges here that we don't belittle what you say, but we take your testimony along with all of the other testimony, and the Court means no rudeness, and for what it is worth, and that goes to add up with everything else that we have heard from this witness stand, and no disrespect is intended, I can assure you.

Judge Pincura called that to my attention, and I don't want you to think that we are belittling you.

Is that all?

Mr. Kleinman: Yes.

[fol. 1203] Cross examination of Edward B. Henning.

By Mr. Osborne:

Q. Mr. Henning, may I ask your age?

A. 37.

Q. How long have you been a movie critic?

A. I am not a movie critic, sir. I am supervisor of the film program in the film program of the Cleveland Museum of Art.

Judge McDermott: He did not say that he was, Mr. Prosecutor, and he did not say that he was a censor.

Q. But you do pick and show films to be shown at the Cleveland Museum of Art?

A. Yes.

Q. In your testimony today, you are speaking today in your own individual capacity, aren't you?

A. I am.

Q. You are not bringing us the official view of the Cleveland Museum of Art?

A. I am not.

Q. And with how many persons do you consult in selecting films for the Museum?

A. It is very irregular. When I am considering a pro-
[fol. 1204] gram, I usually make up a list of films that I would like to show, and I consult with perhaps three to four of my colleagues, and we discuss them, and discuss which ones would fit into this program best, and would answer the needs of the program best.

Q. The motion picture, The Lovers, has that been shown at the Cleveland Museum of Art?

Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Overrule the objection.

By Judge McDermott:

Q. Yes or no?
A. No.

By Mr. Osborne:

Q. When you saw the film in New York and you saw it in Cleveland, you saw no difference in the two films?
A. No, sir.
Q. All right.
When you consider films to be shown, you testified you take into consideration the audience that is expected to be in attendance; is that right, Mr. Henning?
[fol. 1205] A. Yes.
Q. And what is that audience that you expect to be in attendance?
A. It is a mixed audience, of course, and comprised of students and some professional people, and some professors, and also comprised of many ordinary people who are members of the Museum, and many who are not members of the Museum, but follow our programs.
Q. When you speak of "many ordinary people," are you using that in contradistinction to college students and professors?
A. I am using that to signify people who are outside the field of education and art.
Q. Those are ordinary people. Is that right, Mr. Henning?
A. Well, let us say they are all rather ordinary people.
Q. Then the people who are in the field of education are extraordinary?

Mr. Kleinman: Objection and argumentative.
Judge McDermott: Objection is overruled.

By Judge McDermott:

Q. Can you answer that?

[fol. 1206] A. Yes.

Q. Go ahead.

A. I would be glad to substitute the word laymen for the ordinary people.

Mr. Terrell: May the record also show that.

Judge McDermott: Yes; lay people are like we are.

By Mr. Osborne:

Q. In contradistinction to the word laymen in referring to those people ~~who~~ are not laymen, if you are exhausting the field as far as the audience is concerned, and one section were laymen, what is the other group?

A. Professors, educators, and people in the work of art.

Q. Now, would you say, sir, that the audience that you have in mind that would be in attendance at these programs that you devise, would you consider that an audience of average people?

A. This would be very difficult for me to determine without polling the audience.

Judge McDermott: Pin his opinion down to the average persons in the community. That is fair, isn't it?

[fol. 1207] The Witness: Yes.

Judge Pincura: To follow that up, do average persons attend your Museum of Art?

The Witness: Yes, sir; we have half a million attendance each year.

By Mr. Osborne:

Q. At one time, how many persons are in attendance at one of your film showings?

A. Between 200 and 500.

Q. And how many films—how many film showings do you have during the year?

A. About 15.

Q. That would be about a top of 7,500, or 10,000, a year, and that is an extremely small percentage of the total at-

tendance at the Cleveland Museum of Art during the year; isn't that correct?

A. Yes.

The Witness: May I—

Judge McDermott: Do you have a question?

The Witness: I just wanted to say that we also have a program of films for children that we have not—I have not included in this figure.

[fol. 1208] Judge McDermott: Let that remain, and that is a fair comment.

By Mr. Osborne:

Q. When you devise a program for children, that is a program beamed toward that segment of the community?

A. Yes.

Q. So that this other program that you have, is that beamed for children also?

A. No, sir.

Q. Well, then, are you telling us that there is an attendance of average persons at the showing of these films that you show as works of art?

A. Yes, sir.

Q. And that does not allow for attendance of children?

Mr. Terrell: I object, if the Court please.

Judge McDermott: Let the prosecutor finish, please.

Go and finish your question.

The Witness: I am not sure that I understand the question.

Q. You have this program, as you said, for ordinary and extraordinary people?

A. Yes.

[fol. 1209] Q. Now, in devising that program, are you also taking into consideration that children will be in attendance?

A. No, sir.

Judge McDermott: His answer is no.

Q. Then, sir, you are telling us that the audience at that type showing is an audience of average people; is that right?

A. Yes, sir.

Q. And it doesn't allow for the segment of the population known as children?

A. That is right.

Q. Then, in determining the average person for your purpose you are not taking into consideration children?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Read the question back, Mr. Sato.

(Question read back.)

Judge McDermott: He may answer the Court feels as a whole.

A. No, we are not considering children.

Q. When you are devising a program for the children you are not taking into consideration adults, are you, Mr. [fol. 1210] Henning?

A. No.

Q. In devising a program for children, you are not taking into consideration the average person, are you, Mr. Henning?

A. In devising a program for children?

Q. That is right.

A. No; that is true.

Q. You said something to this effect on direct examination, that in selecting film to be shown you have to take into consideration whether or not the expected audience is ready to receive that film; isn't that right?

A. That is right.

Q. Then, in order that a film might be shown and you believe that the audience is not ready to accept it, do you groom the audience for its acceptance?

A. At each showing of the film there is a short discussion of the film beforehand.

Q. Suppose that you came across a film that you felt that the audience wasn't ready to receive that, do you get the audience ready just by this preliminary lecture or discussion?

A. I would like to state this: That our film program continues over the period of a year, and we have no way [fol. 1211] of controlling the audience and knowing that the same people would return to each showing, but we do

try and develop a theme in each program over the course of the academic year, and we try to educate the audience to certain values which are present in the film as a work of art.

The lecture beforehand is a part of this, and there is a cumulative effect of these lectures, and the film is also an important part.

Q. Well, then, you have come across films that are about the standard of the audience expected to be in attendance; don't you?

A. Yes, sir.

Q. And you also come in contact with films that are below the standard; isn't that right?

Mr. Kleinman: Objection, unless we know what standard we are talking about.

Judge McDermott: Can you say, Mr. Henning?

The Witness: Yes.

Judge McDermott: Your answer is yes to that question?

The Witness: Yes.

Q. How do you groom the people for that situation, if [fol. 1212] they are going to see a film below their standard? What do you do to prepare them for that film, Mr. Henning?

A. We don't show films below their standard. Films below standard that we apply to this program, we do not consider as worthy works of art.

Q. And you don't show those?

A. No.

Q. All right.

Would you subscribe to this proposition, sir:

Do you subscribe to this proposition, that there are films which are below the standard of the audience that you expect to be in attendance?

Mr. Terrell: Objection, and that is repetition, if the Court please, and I will object to that.

Judge McDermott: Overrule the objection.

The Witness: I would like to have something clear before I do answer the question, however, the question of standards in film. Below the standard has been used, the

phrase, below standard. Are we talking about esthetic standard or moral standard, or what kind of standard? I would like to have that clarified.

[fol. 1213] Q. Well, sir, you are in charge of the film program, and you must have some standard.

Judge McDermott: Go into the standards that Mr. Henning is using in his work.

Mr. Osborne: That is the point that I use, and he determines those, and he selects the film, and he must have some standard.

Judge McDermott: Go to his standards then.

Q. Are there films in existence below the standard of the Art Museum program?

Mr. Kleinman: Objection, and that is a broad question.

Judge McDermott: Can you answer that?

The Witness: I can't answer yes or no.

Mr. Osborne: I didn't hear that.

Judge McDermott: He said he can't say yes or no.

Q. Then, sir—

[fol. 1214] Judge McDermott: Have in mind that he did say before that there are some pictures of a below standard that he would not permit to be shown.

The Witness: I was speaking of esthetic standards at that time.

Judge McDermott: Now, you listen to the prosecutor, and he will ask you questions.

There are two sides to this case, you know.

Mr. Terrell: He has discovered that.

Judge McDermott: We three Judges are to find the truth, and we are here to seek and find the truth wherever it may be.

Mr. Terrell: Absolutely correct.

By Mr. Osborne:

Q. Would you say, sir, that the dominant theme in The Lovers concerns sex?

By Judge McDermott:

Q. Yes or no.
A. I don't think I can answer that yes or no.

By Mr. Osborne:

Q. All right.
A. It concerned sex.

[fol. 1215] Judge McDermott: Wait for the next question now.

Q. I direct your attention, sir, to the scene in the bedroom of the so-called heroine where the archaeologist is with her.

Now, what sex act or acts took place in that bedroom?

A. I did not see any sex acts take place.

Do you mean what did I infer took place?

Q. I say, what sex act or acts took place in the bedroom?

Mr. Terrell: I object, if the Court please.

Judge McDermott: He asked the prosecutor about infer, and let the prosecutor go on.

Mr. Terrell: If there is an inference, I would not have any objection, your Honor.

Judge McDermott: He is your witness, and the State did not bring him here.

Mr. Terrell: I want him to—withdraw the objection.

Judge McDermott: Go ahead, Mr. Prosecutor.

[fol. 1216] Q. You don't know whether or not any sex act took place; is that right?

A. I do not know.

Q. What took place when the woman was lying on the bed?

A. I remember the picture of the woman's face with that rapturous expression, and I remember them lying together side by side, and I remember several acts of affection such as the grasping of the hands, tracing her finger on his back.

Q. Well, before they clasped hands, are you referring to the time when she is on the bed?

A. Yes, I believe that she was on the bed at that time.

Q. She asked him to take—

A. Her hand.

Q. Yes.

What took place immediately prior to that, Mr. Henning?

A. I believe that they kissed. I remember him moving backward and up and out of the camera range at that time.

Q. What did the expression on her face indicate it was?

A. It indicated to me that she was very happy.

[fol. 1217] Q. And did it indicate to you as to what was the cause of her happiness?

A. Cause of her happiness wasn't directly indicated to me.

Q. Then, you got no mental picture why she was so happy?

A. I have a mental picture, but the picture wasn't on the screen.

Q. That is what I am asking you, indicated in your mind?

A. What was indicated in my mind is that there were two people here together in a bedroom making love, both very, very much in love.

Q. And that was all that was indicated to you, is that right?

A. Yes.

Q. Well, did you—was it indicated to you that any act of sexual intercourse took place?

A. I inferred from the entire scene that sometime during that night the two must have made love, and they must have committed sexual intercourse.

I inferred that, but I don't think that it was stated in the scene at any place.

Q. Now, when did that act take place as far as the film was concerned?

[fol. 1218] A. I haven't any idea, and I don't know how many times it took place.

Q. You don't know when it took place once?

A. I don't know.

I don't know specifically. I can, as I say, what my inferences were.

Q. Well, tell us that?

A. I would assume that sometime while they were in the bedroom that the act must have taken place.

Q. Well, was it when they were standing up and before they got to the bed?

A. I really don't know. As I said—

Q. Did it take place—

Mr. Terrell: If the Court please—

Judge McDermott: Let the prosecutor go ahead, and his questions are in order, and please let him go forward.

Q. Did it take place after she left the bed and went into the bathtub?

A. May I answer—perhaps we can get around it in this way, and perhaps—

Q. You were a school teacher, and you understand English, don't you?

Mr. Terrell: Let us not argue with the witness.

[fol. 1219] Judge McDermott: He said sometime in the bedroom it took place, and inferred, and let the prosecutor have his chance now.

Mr. Terrell: I don't mind that, and I don't want him arguing with the witness.

Judge McDermott: He has a right to pin Mr. Henning down.

Mr. Terrell: But if he doesn't give him the answer that Tom wants, Tom gets mad, your Honor.

I withdraw my objection.

Mr. Osborne: You withdraw the objection?

Judge McDermott: He just said he did.

He is being tested, Mr. Henning, that is, by what he saw and inferred.

Q. Did it take place before they clasped hands, or after they clasped hands?

By Judge McDermott:

Q. Yes or no?

A. I do not know.

By Mr. Osborne:

[fol. 1220] Q. Now, sir, will you tell us when you observed the facial reactions of the woman on the bed, will you tell us where the man was?

A. Man wasn't in view of the camera.

Q. Now, sir, you have told us where he wasn't. Now, please tell us where he was?

Mr. Terrell: Now, if the Court please.

Judge McDermott: That is in the form of an argument. What is the question?

Q. Please tell us where he was?

A. The question suggests that in a film which is a visual art form—I don't know where the position of someone is that is not within camera range, and it would be impossible for me to know the exact location of this man.

Q. I am not asking for the exact location, but in general?

A. I would say that he was within touching distance of this woman.

Q. Was he closer to her head than to her feet, Mr. Henning?

By Judge McDermott:

Q. If you know from what you saw?

[fol. 1221] A. All I saw was her head, and he disappeared out of camera range in the direction of her feet.

By Mr. Osborne:

Q. Was he closer to her head than he was to her feet?

A. I don't know.

Q. Was he closer to her eyes than her legs?

A. Closer to her legs.

Q. Was he closer to her neck than her knees, Mr. Henning?

A. Closer to her knees, probably.

Q. So, would you tell us in general where he was closer to her body? What part of her body?

Judge McDermott: As best you can say from what you saw, Mr. Henning.

The Witness: Gentleman disappeared from camera range toward her feet, and he was close enough probably to clasp hands, and I do surmise from that that he was closer to the lower part of her feet.

Q. When you speak of "gentleman" what is your definition of the term?

Mr. Kleinman: Objection, if the Court please.

Mr. Osborne: I am asking that—

Judge McDermott: Sustain the objection.

[fol. 1222] Mr. Terrell: Thank you.

Judge McDermott: You are throwing the answer that you want into his face, and you dare not do it.

By Mr. Osborne:

Q. You say that the archaeologist was a man of learning and culture; is that right?

A. I believe that was indicated.

Q. How do you define culture, sir?

A. I suggest that—

Q. Don't suggest!

Mr. Terrell: Let him answer, and objection.

Judge McDermott: Give Mr. Henning a fair chance.

The Witness: He was obviously interested in the books in the library at the home, and interested in the music which he played, and engaged in conversation with the ladies for a good part of the time that they were in the living room.

When they were consulting about the archaeological findings in the south of France, I believe her husband also [fol. 1223] showed him publications in which these were discussed and where the articles were published, and he obviously was concerned with them.

Judge McDermott: Another question now.

Q. That is your definition of culture; is that right?

A. That was the reason that I inferred that the gentleman was concerned with matters of culture, Mr. Prosecutor.

Q. Now, what characteristics of culture occurred when he was in the bedroom of the woman, the so-called heroine, Jeanne Moreau?

Mr. Kleinman: Objection, if the Court please, and that is argumentative.

By Judge McDermott:

Q. Can you answer that?

A. There were two indications of culture in the bedroom scene.

By Mr. Osborne:

Q. What characteristics of culture were indicated as he watched the woman kiss her daughter, and then went into the woman's bedroom with her?

Mr. Terrell: I must object, if the Court please, as that was not indicated on the screen!

[fol. 1224] Judge McDermott: Yes, we don't know that he watched the woman kissing her daughter, but he was close by.

Mr. Osborne: He talked about the mother kissing her daughter.

Judge McDermott: But we don't know whether he saw the mother kiss the daughter, but we saw that she did.

Q. Could you tell us, sir, whether or not the dominant theme concerns sex?

By Judge McDermott:

Q. Yes or no?

A. It concerns sex, but not exclusively.

By Mr. Osborne:

Q. All right.

What did it consider, besides sex?

A. Concerned with human relations other than sexual, and concerned with regard for one another, and self-respect and respect, and humor, and with integrity, and concerned with all facets of human relationship, it seems to me.

Q. You say the dominant theme concerned with all those things?

A. Yes, I think that their relationship was based on far more than sex, and I think that was clearly indicated in [fol. 1225] the film.

Q. How many instances of humor did you see?

A. I saw one outstanding instance of humor.

Q. And that was part of the dominant theme, Mr. Henning?

A. I think that was part of the indication of the character of the archaeologist.

Q. Are you referring to this movie as a comedy, Mr. Henning?

A. No, sir.

Mr. Terrell: Objection, if the Court please.

Judge McDermott: Form of argument, and strike that out.

Q. What was the significance, if any, from an artistic point of view of the fact that the archaeologist released the fish from the net, which net had been set by the husband?

A. I would say that the significance of this—that this seems in a way symbolic of the Archaeologist's belief in freedom, in individual freedom.

Q. Now, what do you mean by individual freedom, Mr. Henning?

A. I think that at this rapturous moment the archaeologist did not want to see fish or any other living being [fol. 1226] trapped and snared, and in a way the fish was symbolic of the woman, who was snared in her marriage.

Q. And then the resolution of that difficulty would be to have sexual relations with the archaeologist, is that correct?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Sustain the objection.

Q. Was the resolution of the difficulty the abandonment of the husband and the child?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: That is guessing, and he said why the fish were released.

Another question.

Q. Then, you are drawing an analogy between the fish in the net and the woman.

Is that right?

A. A very loose one; yes. I wouldn't want to pursue that very far.

Judge McDermott: Anything else now?

Mr. Osborne: Little bit more, Judge.

[fol. 1227] Judge McDermott: Trying to speed up a little bit, so that we can get through.

By Mr. Osborne:

Q. In the last few years you said that the American film industry is tending to deal more directly and honestly with sex.

How do you use the word honestly in that connection, Mr. Henning?

A. I meant by that statement that the films tended to deal with problems of the relationship between the sexes in a direct way, and to suggest that these problems are serious problems, and problems which cannot be solved by avoiding them or overlooking them.

I was contrasting that attitude with the attitude which deals with the problem of sex and human relations by skirting the issue, and by dealing with them in terms of innuendo and insinuations, and which never proposes any solution other than the time honored Hollywood solution that they get married and lived happy after.

Q. That is the Hollywood solution?

A. I withdraw that, and I am sorry, and I spoke loosely.

Q. That is a solution that has been used in some films?

[fol. 1228] A. Well—

Q. But you did say that?

A. Yes, I did.

Judge McDermott: He said that he withdrew this.

Q. Will you tell us, sir, why it was artistic to present the specific details of a woman physically reacting to an orgasm in this picture?

A. Yes. May I have permission to observe—make a detailed reply about that?

Judge McDermott: Yes, you may talk about that.

The Witness: It seems to me that the scene is one which is of great significance. I would not, however, try to take the details of that scene out.

I think that the entire scene and the entire film have to be dealt with as a unit, and that to subtract elements would be to destroy the work of art.

I think that this film, which I believe is a work of art, was an outstanding portrayal of her feelings about love, and I think that the scene to which you just referred had

[fol. 1229] great significance in that it establishes in the minds of the audience that the love affair between Jeanne and the archaeologist was one of true and deep love.

I think that was shown rather beautifully, and you will recall it as a scene of great tenderness, and I think that without that scene we would be in danger of thinking that Jeanne was simply going from one affair to another.

Q. All right.

Now, are you saying to us, sir, that that scene was an integral part of the picture?

A. I am.

Q. And are you telling us that if that were withdrawn, the effect of the film would be lessened?

A. I am.

Q. And then that scene was part of the dominant theme of the picture?

A. I am.

Q. All right.

Now, sir, are there any paintings in the Cleveland Museum of Art showing the facial reactions of a woman experiencing an orgasm?

Mr. Kleinman: Objection, if the Court please.

[fol. 1230] Judge McDermott: Wait, and don't answer.

(Conference held at this time among the three panel Court.)

Judge McDermott: Court unanimously believes that he should answer.

By Judge McDermott:

Q. Yes or no?

A. No.

By Mr. Osborne:

Q. Is there any statuary in the Cleveland Museum of Art showing the facial reactions of a woman experiencing an orgasm?

Judge McDermott: He may answer.

A. No.

Q. Do you have—

Have you shown any motion pictures in the Cleveland Museum of Art to the children or to this ordinary—extraordinary audience—any films showing the facial reaction of a woman experiencing an orgasm, Mr. Henning?

Judge McDermott: Mr. Henning, you may answer.

The Witness: May I have that question again?

[fol. 1231] Judge McDermott: Yes. Read it to him, Mr. Sato.

(Question read back at this time to the witness.)

A. No.

Mr. Osborne: No further questions.

Judge McDermott: Anything further, gentlemen?

Mr. Kleinman: May we have a moment?

Judge McDermott: Yes.

(Conference between Mr. Kleinman and Mr. Terrell held at this time.)

* * * * * * *

[fol. 1240] Thursday afternoon, June 2, 1960, at 3:50 P. M.

Judge McDermott: Are you ready to proceed, gentlemen?

Mr. Kleinman: We will call Nico Jacobellis as our next witness.

Judge McDermott: Proceed.

Thereupon, the defense, in order to further maintain the issues on its part to be presented, called as a witness the defendant, Nico Jacobellis, who, after being first duly sworn, was examined and testified as follows:

Direct examination of Nico Jacobellis.

By Mr. Kleinman:

Q. State your name, please?

A. Nico Jacobellis, stands for Nicola; Nicholas in English.

Q. Where do you live, Mr. Jacobellis?

A. 10834 Deering Avenue, Cleveland, Ohio.

[fol. 1241] Q. You are the defendant in this case?

A. Yes, I am.

Q. Where were you born?

A. Born in Bari, Italy.

Q. What is your birthday?

A. July 4, 1922.

By Judge McDermott:

Q. July 4, 1922?

A. Yes.

Mr. Kleinman: I did not know that.

By Mr. Kleinman:

Q. Did you go to school in Italy?

A. Yes, completed elementary education and high school.

I was graduated as a teacher from the Teachers' College in Bari, Italy, and started to attend the University of Naples.

Q. And when was that when you went to the University of Naples?

A. 1945.

Q. When did you come to the United States?

A. '48; March, '48.

Q. Is your family here now?

A. No; my family is in Italy.

[fol. 1242] Q. And when you arrived in the United States, in what city did you reside?

A. Cleveland.

Q. Have you resided in Cleveland since you came to the United States?

A. That is correct.

Q. Will you state what education you had in the United States, if any?

A. I attended Cleveland College and Western Reserve University, and I was awarded a B. A. degree in '52, and I also attended the Cleveland Playhouse for over a year as a trainee.

I then went back to the Western Reserve University in the graduate school, dramatic arts, and completed all requirements there.

Q. Did you appear in productions at the Playhouse w' ile you were a student?

A. Yes, and with other summer stock companies around town, and in Ohio.

Q. What was your occupation when you first arrived in the United States?

A. Well, I was primarily a student, but I was engaged at the same time in various activities, social activities, and I was a teacher at the Berlitz School of Languages.

[fol. 1243] I directed and announced some nationality programs over W.D.O.K. and W.H.K., and I also contributed to the Italian weekly here, of which I became editor later.

Q. When did you become associated with the Heights Art Theater?

A. At the end of May, 1955.

Q. And what position did you take with the company operating the Heights Art Theater?

A. In the beginning I was assistant to Ed Schuman, one of the owners, who resided in Cleveland, and then became manager of the theater.

Q. And when did you become manager of the theater, Mr. Jacobellis?

A. A few months later, but I can't recall the date.

Q. '55?

A. '55.

Q. Are you a citizen of the United States?

A. Not yet.

Q. Will you describe your duties as manager of the Heights Art Theater?

A. As manager I supervise the entire physical operation of the theater. I take care of the advertising, publicity, and promotion for the theater, and the productions that are [fol. 1244] scheduled to be presented.

Physical operation, of course, includes to see that the theater is properly run, supervise personnel, the maintenance, and whatever repairs are involved, to see that the pictures—that is, to see the prints of the film get in, in time, and get on the screen, and are properly put on the screen.

Q. Before we get further into that, are you married, Mr. Jacobellis?

A. I will be as soon as trial is over.

By Judge McDermott:

Q. But not now?
A. Not at the present time.

By Mr. Kleinman:

Q. You have not been married?
A. No.
Q. Now, with specific reference to the film shown at the theater, do you arrange for screening of the film for critics and other persons?
A. Yes, that is one of my duties.
Q. Do you book films that are shown at the Heights Art Theater?
A. No.
Q. Who books the films?
A. General Manager of our company, and the president [fol. 1245] himself booked the films.
Q. And what is your duty as manager with reference to the films that are sent to you for showing at the theater?
A. The date is arranged for the showing, and my duty is to screen the picture for the critics, take care of all of the advertising, and see that the picture is presented on the date that is scheduled.
Q. Do you have any right to tamper with the film in any way?

Mr. Osborne: Objection, if the Court please.
Judge McDermott: Sustain the objection.

Q. Are you authorized to make cuts in any of the film?
A. No, I am not.
Q. Do you know what action would be taken in the event that you failed or refused to show a film which is booked for showing at the Heights Art Theater?
A. Well, I would be fired.
Q. With specific reference to the film, "The Lovers," was that film booked in the manner in which you have described by the general manager and/or by the president of the company?

[fol. 1246] A. Yes, they bought the film and scheduled the same for showing.

Q. And did they advise you of the booking of the film and the date for showing?

A. Yes, sir; they did.

Q. And was the film shipped into the Heights Art Theater for showing?

A. That is right.

Q. Now, prior—withdraw the question.

On November—withdraw that.

Did you show this film in the screening room of Twentieth Century-Fox prior to showing that at the Heights Art Theater?

A. Yes, certainly, for the critics. On Tuesday before.

Judge McDermott: Answer is yes, and strike out the balance.

Q. For whom did you exhibit the film at that time, Mr. Jacobellis?

A. For whom?

Q. Yes.

A. Ward Marsh of the Cleveland Plain Dealer; Arthur Spaeth, at that time critic for the Cleveland News; and substitute for Stan Anderson was Paul Mooney of the Cleveland Press.

Q. And on what date was that?

[fol. 1247] Mr. Osborne: He said Tuesday before.

The Witness: Tuesday, the 10th of November.

Q. Would you state, in general, what type of theater is the Heights Art Theater? Speaking with reference to the audience and the type of film shown, and the physical arrangement?

A. It is a theater for the showing of movie pictures primarily, and not necessarily foreign films, on a higher level culturally speaking, and intended for a sophisticated, mature, cultured, intelligent audience, an audience that, in other words, takes its entertainment rather seriously.

Q. Will you describe the theater physically, just briefly?

A. We have art exhibitions in the lobby, art exhibits, paintings, and ceramics, and other works of art by local

artists, especially, young artists that need to show their works.

We don't have any concession stand, that is to say, we don't sell candy or popcorn or chewing gum, soft drinks, and what have you, and we only have a coffee counter where we serve complimentary coffee for people that come to the theater, and they are waiting for the feature to end [fol. 1248] and the next program to start.

They drink coffee in a relaxed atmosphere while they glance at magazines that we have on the tables there.

We don't allow children unless a picture is suitable for them, and even in this case they must be accompanied by parents.

Q. Will you state some of the pictures which have been shown at the Heights Art Theater since you became manager of the theater?

A. Some of the pictures, Ordet, Room at the Top, And God Created Woman.

Judge McDermott: What was that last?

The Witness: And God Created Woman, Wild Strawberries, Seventh Seal—

Judge McDermott: Seventh what?

The Witness: Seal, Madam Butterfly, Swan Lake, Mouse That Roared, and many others.

Most of these pictures, if I may add, are prize winner pictures that have received the greatest acclaim by critics, not only abroad but in this country.

[fol. 1249] Mr. Osborne: Objection, if the Court please.

Judge McDermott: Let it stand now, and that is what he said. That is his opinion.

Q. In connection with the showing of films at the Heights Art Theater, have you had occasion to, or do you have access to, critical reviews and similar information relative to film to be shown at the theater?

A. Yes.

Of course, in order to know everything about the picture for my promotional and publicity purposes primarily, I read all advance material on the picture, which included reviews appearing in the major publications in this country as well as some publications from abroad.

Q. With particular reference to the film, "The Lovers," did you have any such information, or did you read any such reviews?

A. Yes, I did.

Mr. Kleinman: Will you mark these, please?

Saturday Review, dated August 8, 1959, Marked as "Defendant's Exhibit L".

New York Herald Tribune, dated November 8, 1959, marked as "Defendant's Exhibit M".

[fol. 1250] New York Times, dated October 27, 1959, marked as "Defendant's Exhibit N."

Judge McDermott: Go ahead.

Mr. Kleinman: I just want to get these exhibits marked for the record, Your Honor.

Judge McDermott: All right.

By Mr. Kleinman:

Q. I hand you now what has been marked for identification as Defendant's Exhibit L, and ask you if you recognize this document?

A. Yes, this is a review by Hollis Alpert, which appeared in the Saturday Review of Literature, and which I read prior to the showing of this picture.

Q. I hand you now what has been marked for identification as Defendant's Exhibit M, and ask you if you recognize this article?

A. Yes, I do.

It is an editorial article on The Lovers by Paul Beckley of the Herald Tribune, which I read prior to the showing of The Lovers.

Q. Did you clip this from the New York Herald Tribune and paste this on this sheet of paper?

A. Yes, I did.

Q. And that is the article headed "Malle's 'Lovers' Is [fol. 1251] a Moral Work"?

A. Yes.

Q. And I hand you what has been marked as Defendant's Exhibit N, and ask you if you recognize this article, Mr. Jacobellis?

A. Page from the New York Times in which there is a review on the "Lovers" by A. H. Weiler appeared, and that is another review that I read prior to the showing of the Lovers.

Q. Did you clip this sheet of newspaper from the New York Times of October 27, 1959?

A. Yes, I did.

Q. Did you say that you had read these reviews prior to the time of the showing of the film, "The Lovers"?

A. That is correct.

Mr. Kleinman: We would like to introduce into evidence—

Judge McMahon: These are Defendant's Exhibits L, M, and N.

Mr. Osborne: Well, your Honors, with reference to the first one—

Judge McMahon: Alpert.

Mr. Osborne: That is a duplicate of what is already in the evidence.

[fol. 1252] Mr. Kleinman: We can eliminate that later.

Judge McDermott: Now, just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Judge McDermott: Court feels that it should be received, as we are thinking about the New York version of this picture.

Judge McMahon: I think the reason for this is that when the State withdrew its exhibits—

Mr. Kleinman: I am not sure if these are in or not.

Judge McMahon: It was in connection with the deposition.

Mr. Kleinman: The Alpert article is in, I believe.

Judge McMahon: Can we do this by stipulation?

Mr. Kleinman: We will withdraw Defendant's Exhibit L if it is now in evidence, and consider that other exhibit as being the defendant's exhibit.

[fol. 1253] Judge Pincura: State does not go along with you.

Judge McDermott has admitted those three exhibits subject to the same ground rules that the Court hereto ruled, that is, ground rules to the effect that this is a New York

version shown in New York and these particular critics' reports from the New York papers cover the New York version of the film, and not the version shown at the Cleveland Heights Art Theater.

Judge McMahon: Those New York critics' reviews covering the New York version of the film shown in New York are received into evidence for what it may be worth in connection with this trial.

Is that correct?

Judge McDermott: That covers our thinking here, and you may have your exceptions to the Court's ruling.

Mr. Osborne: Well, your Honor, we—

Judge McDermott: Anything else, gentlemen?

Mr. Kleinman: Judge, they are conferring.

(Conference of Mr. Osborne and Mr. Stuplinski held at [fol. 1254] this time.)

Judge McDermott: Gentlemen, are we ready?

Mr. Osborne: Judge, we have a matter here for a moment. Off the record.

(Conference off the record held with the Court at this time.)

Judge McDermott: Last witness, Mr. Kleinman?

Mr. Kleinman: Last witness for the defense.

Judge McDermott: Let us get through, gentlemen.

Our job is to expedite the trial but to be fair at the same time.

Proceed, Mr. Kleinman.

By Mr. Kleinman:

Q. Mr. Jacobellis, would you have any information whether that motion picture film had won any prize in the motion picture industry?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

[fol. 1255] A. Yes. I was informed that the picture—

By Judge McDermott:

Q. Yes or no?
A. Yes.

By Mr. Kleinman:

Q. What awards did the film, "The Lovers," receive, Mr. Jacobellis?

A. Silver Lion, second prize, Venice International Film Festival of 1958.

Q. Were you aware at the time that you showed the film at the Heights Art Theater—withdraw the question.

On what dates did you show the film, "The Lovers," at the Heights Art Theater?

A. Twice on the evening of November 12th, and once on Friday, November 13th, and the second showing on Friday, November 13th, the picture was stopped.

Q. Now, on November 12th, before the film was shown, did you receive any communication from Captain Gordon of the Cleveland Heights Police Department?

A. Communications?

Q. By telephone, or otherwise?

By Judge McDermott:

Q. Yes or no? Did you?
A. Yes

By Mr. Kleinman:

[fol. 1256] Q. What communication did you receive from Captain Gordon?

A. Captain Gordon called me about 4:00, or 4:30, Thursday, November 12, 1959, and asked me if I could arrange for a screening of the picture for the police department of Cleveland Heights.

Q. He asked you if you would screen the picture for the Cleveland Heights Police Department?

A. Yes.

Q. And what did you reply?

A. Too late in the afternoon, and I could not get hold of the operator, and I invited him to see the picture at 7:15 when we would start in the evening.

Q. Was this customary procedure so far as the Cleveland Heights Police Department's relationship with the Heights Art Theater was concerned?

A. How do you mean?

Q. Has this happened before? Has the police department, or anyone from the police department, called you to show the film?

A. Yes.

Q. Now, you permitted—or, did Captain Gordon appear that evening to view the film on the 12th of November?

A. Yes, I saw him leaving the theater.

[fol. 1257] Q. You did not see him enter the theater?

A. No, but I saw him leave the theater.

Q. Did Captain Gordon as he was leaving the theater talk with anyone at any time while he was in the theater?

By Judge McDermott:

Q. Yes or no?

A. No.

By Mr. Kleinman:

Q. Did you hear from Captain Gordon or any official of the City of Cleveland Heights between the time that Captain Gordon left the theater on November 12, 1959, until you left the theater when the show was over?

By Judge McDermott:

Q. Yes or no?

A. No.

By Mr. Kleinman:

Q. Did you receive any communication from the police department, City of Cleveland Heights, between the closing of the theater on the 12th of November, 1959, and the time that you opened the theater on the 13th of November?

A. None.

Q. Now, did you show the film on the 13th of November, that is, the indictment date?

A. Yes, I did.

[fol. 1258] Q. At what time did you show the film on that evening?

A. Program started on Friday at 6:30.

Q. Were you in the theater when the program started, Mr. Jacobellis?

A. Not at that time.

Q. What time did you arrive at the theater?

A. I arrived at the theater about 7:30.

Q. And at that time was Captain Gordon in the theater?

A. I don't know.

Q. You don't know if he was?

A. I don't know.

Q. Do you know if any of the officials of the City of Cleveland Heights or the County of Cuyahoga were in that theater at that time?

A. No, I don't.

Q. Now, after the first showing on November 13th, do you know whether or not Captain Gordon or anyone from the City of Cleveland Heights, that is, official of the City of Cleveland Heights, or any official of the County of Cuyahoga were in the theater?

A. I don't know.

Q. After the—withdraw that.

Where were you from the time when you came into the [fol. 1259] theater on the 13th until the end of the first showing of the film?

A. In the beginning I checked the operation and the change of program, and I went to my office.

Q. Where is your office?

A. Upper lobby of the theater.

Q. Did you remain there from the time that you arrived until the commencement of the second showing that evening?

A. Yes, I did.

Q. When did you first see Captain Gordon at the theater on Friday, the 13th?

A. It must have been around 8:30 in the evening when he came to my office.

Q. You were in your office at the time?

A. Yes.

Q. And did Captain Gordon come in alone at that time?

A. No. He was with two other men.

Q. Do you know who the other men were, Mr. Jacobellis?

A. One was Sergeant Cannon, and one was a private, and his name was Peter, but I don't know his last name.

Q. What did they do when they came into the theater?

[fol. 1260] A. I was reading the paper, and Captain Gordon came to my desk and informed me that by orders of Chief Gaffney and Cuyahoga County Prosecutor Corrigan they were to take me and stop the showing of the movie.

Q. Now, approximately what time was that on Friday, the 13th?

A. Around 8:30 P.M.

Q. And was the film, "The Lovers," then being shown in the theater?

A. Yes, the second showing had begun.

Q. Do you know what time the second showing started that evening?

A. I don't know exactly. About 8:15, I believe.

Q. Do you know how many people were in the theater at the time of the visit from Captain Gordon, that is, around 8:30 that evening?

A. At that time, there must have been around 350 and the whole evening until the time that this occurred there were 404 people in the theater.

Q. How many seats are there at the Heights Art Theater?

A. 925.

Q. Will you state further what happened after Captain Gordon advised you that he was going to stop the showing [fol. 1261] of the film?

A. He asked me where the projection booth was, and asked me to lead them there and to tell the operator to stop the showing, so I did, and we went to the booth and told the operator to stop the showing.

Then Captain Gordon asked me if I would make an announcement to the audience, and accompanied me into the auditorium where I advised the audience that the show was being stopped by order of the Cleveland Heights police, and asked the people to kindly move out in an orderly way and we would refund them their purchase price.

Then we stopped for a moment, until Captain Gordon turned me over to one of his detectives, and I was taken to the police station.

Q. That is in the City of Cleveland Heights, is that correct?

A. Cleveland Heights.

Q. Were refunds made to the patrons for that evening?

A. Yes, I made arrangements with my assistant to give a refund to every customer that was in the theater at that time.

Q. Now, from the time that you first screened the film on November 12th until the film was seized on November [fol. 1262] 13th by Captain Gordon of the Cleveland Heights Police Department, had you had any indication or communication from anyone in the Cleveland Heights police department or the County of Cuyahoga relative to this motion picture film, other than the request by Captain Gordon to view the film?

Mr. Osborne: Objection, if the Court please.

Judge McDermott: Overrule the objection.

The Witness: None whatsoever.

Q. Did you know prior to the time that Captain Gordon came to the theater that the film was going to be stopped?

A. No, I did not.

Q. Has there ever been an arrest at the Heights Art Theater; that is, in the theater or immediate premises of the Heights Art Theater, since you have been manager of the theater?

A. Never.

Q. Have you ever been requested by anyone in authority in the City of Cleveland Heights or the County of Cuyahoga not to show a particular film at your theater, Mr Jacobellis?

A. No.

[fol. 1263] Q. Have you ever been asked to cut any part of a film which you have scheduled for showing at the Heights Art Theater by these same persons?

A. No.

Judge McDermott: Anything else?

Mr. Kleinman: Anything else?

Judge McDermott: Yes, do you have anything else?

Mr. Kleinman: Yes.

Judge McDermott: Proceed, Mr. Kleinman.

By Mr. Kleinman:

Q. With reference to the—I'll withdraw that.

Have you ever intentionally shown an obscene motion picture film at the Heights Art Theater?

Judge McDermott: Sustain the objection.

Mr. Osborne: What was the question?

Mr. Kleinman: He did not object, your Honor.

Judge McDermott: But the Court did, and we are concerned with "The Lovers" in this case.

[fol. 1264] Mr. Kleinman: I heard him say he didn't hear the question.

Judge Pincura: We realize that, but the Court on its own motion sustained that, and that wouldn't be pertinent to this picture, "The Lovers".

Q. With reference to The Lovers, in your opinion, having in mind the average person and applying contemporary community standards, do you feel that the dominant theme of The Lovers appeals to the prurient interest?

By Judge McDermott:

Q. What do you say, Mr. Jacobellis?

A. In my opinion, not in the least.

Judge McDermott: Anything else of this witness?

(Conference held at this time between Mr. Terrell and Mr. Kleinman.)

Q. With reference to the showing of the film, "The Lovers," what arrangements were made relative to the age of persons admitted into the theater?

A. Nobody under eighteen years of age was admitted into the theater.

Mr. Kleinman: May I have a moment?

Judge McDermott: Yes, but we should finish with this witness today.

[fol. 1265] (Conference held between Mr. Kleinman and Mr. Terrell.)

Judge McDermott: Anything else, gentlemen?

Mr. Kleinman: That is all. Your witness.

Judge McDermott: And now for the prosecution.

Mr. Osborne: Yes.

Judge McDermott: Now, Mr. Prosecutor, let us finish up here.

[fol. 1266] Cross examination of Nico Jacobellis.

By Mr. Osborne:

Judge McMahon: Will this take a little time, Mr. Prosecutor?

Mr. Osborne: I don't think so, Judge.

Judge McMahon: Proceed, Mr. Prosecutor.

Q. You say that you were in charge of the advertising for the Heights Art Theater, is that right, Mr. Jacobellis?

A. Yes, sir.

Q. I direct your attention to State's Exhibit 7, Cleveland Plain Dealer, dated November 12, 1959, and specifically to —what page, Bernie?

Mr. Stuplinski: Page 36.

Mr. Osborne: 36?

Mr. Stuplinski: Yes.

Mr. Osborne: Yes, I see it is 36 here.

Q. Did you arrange for this ad that appears there, Mr. Jacobellis?

A. Yes, I did.

[fol. 1267] Q. And did you arrange for the caption—just a minute—this is really page 41—did you arrange for the caption:

"When all conventions explode . . . in the most daring love story ever filmed!"

A. No, I didn't.

Q. Who arranged for that?

A. The distributor had that ad already made up.

Q. Did you take the ad to the Plain Dealer, Mr. Jacobellis?

A. Yes.

Q. You saw the ad?

A. Yes.

Q. Now, to what cultured audience were you appealing or patrons when you carried the ad with this caption to the newspaper?

Mr. Terrell: Objection, if the Court please.

Q. "When all conventions explode . . . in the most daring love story ever filmed!"

Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Overrule the objection.
Let him say.

[fol. 1268] A. I never thought in that line.

Q. You told us on direct testimony that the Heights Art Theater catered to a sophisticated and cultured and mature audience?

A. Yes.

Q. I am asking you to what class of patrons you were appealing with that kind of caption?

Mr. Kleinman: Objection.

Judge McDermott: Overrule the objection, and let him say.

A. I am unable to say to what particular culture audience.

Q. Were you appealing to any prospective patrons on a cultural basis with that ad?

Judge McDermott: Yes or no, Mr. Jacobellis.
Mr. Kleinman: Objection, if the Court please.
Judge McDermott: Objection is overruled.
Will you answer the question yes or no, Mr. Jacobellis?
The Witness: Yes.

Q. Tell us what type of cultured persons to whom that would appeal?

[fol. 1269] A. General audience.

Q. Now,—

Mr. Osborne: Where are those photo copies, do you know, of the Press?

Mr. Stuplinski: I will check.

Q. Referring to State's Exhibit 9, and specifically 9-A, lower half of page 26, Cleveland News, November 11, 1959, did you arrange for that ad which is identical with the one in the Cleveland Plain Dealer that I asked you about before?

By Judge McDermott:

Q. Yes or no?
A. Yes.

By Mr. Osborne:

Q. You arranged for that?
A. Yes.
Q. Were you appealing to prospective patrons on a cultural basis?
A. Yes.
Q. When you had the ad in the caption:

"When all conventions explode . . . in the most daring love story ever filmed!"

A. Yes.
Q. I refer to State's Exhibit 10, Cleveland News, November 12, 1959, and with specific reference to State's Exhibit [fol. 1270] 10-A, Cleveland News, November 12, 1959, right-hand portion of page 34, did you arrange for this large ad concerning the Heights Art Theater?
A. Yes, I did.
Q. And within that ad appears a quotation from the New York Post as follows:

"One of the most important films of the year. It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality."

Did you arrange for that within the ad, Mr. Jacobellis?
A. Yes, I did.
Q. Now, on what cultural basis were you appealing to prospective patrons?

Mr. Kleinman: Objection, if the Court please.

A. In terms—themes.

Q. Then, you subscribe to this principle, quoting from your ad:

"It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality."

Q. Do you subscribe to that principle, that description of the film?

A. Yes. That is a quote from an important—

[fol. 1271] By Judge McDermott:

Q. Do you subscribe to that?

A. Yes.

By Mr. Osborne:

Q. Then, you are telling us, sir, that the dominant theme of this film is sex?

Mr. Terrell: Objection, and one doesn't follow the other!

Judge McDermott: Sustain that, and we didn't hear that.

Q. I refer to State's Exhibit 11 and 11-A, Cleveland News, November 13, 1959, with specific reference to the ad on page 23, did you arrange for that large ad for the Heights Art Theater?

A. Yes, I did.

Q. And did you arrange for that part of the quotation from the Saturday Review in the ad:

"Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair. Something of a sexual revolution appears to be going on in the cinema and Malle may well be one of the prophets."

Q. Did you arrange for that?

[fol. 1272] A. I did not arrange for that, but it was received in the ad, and I used that.

Q. Do you subscribe to that principle contained in that ad?

Judge McDermott: You said that once before.

Q. I am asking you, do you subscribe to this statement and I quote:

"Something of a sexual revolution appears to be going on in the cinema and Malle may well be one of the prophets."

Q. Do you subscribe to that principle?
A. Yes.
Q. Then, you are telling us, sir, that this film was revolutionary?

Mr. Kleinman: Objection, and that isn't what he said.
Judge McDermott: Sustain the objection.

Q. I am quoting right from the ad, Judge:

"Something of a sexual revolution appears to be going on in the cinema and Malle may well be one of the prophets."

Judge McDermott: Court will reverse itself.

[fol. 1273] Q. With reference to the film, "The Lovers," do you subscribe to the statement that it is revolutionary, Mr. Jacobellis?

Mr. Terrell: Objection, if the Court please.
Judge McDermott: Overrule the objection.

By Judge McDermott:

Q. What do you say, Mr. Jacobellis?
A. In some respects.

Judge McDermott: After all, an ad is an ad.

By Mr. Osborne:

Q. And did you arrange for the ads for this film that appeared in the Cleveland Press?
A. Yes, I did.

Mr. Osborne: Now, just a few more questions, sir.
The Witness: Yes.

Q. You were in charge of the personnel, were you not?
A. Yes.
Q. Of the Heights Art Theater?
A. Yes, sir.

[fol. 1274] Q. The projectionist was under your supervision, was he not?

A. Yes, sir.

Q. And that was on Thursday—rather, Friday, November 13, 1959?

A. Yes, sir.

Q. And also on the day before, Thursday, November 12, 1959?

A. That is right.

Q. You did not know that some critic had picked it as one of the ten best of the year when you showed that film, did you?

A. Not at that particular time.

Q. As a matter of fact, the picking wasn't done until January 3, 1960.

Isn't that right?

A. That is correct.

Q. Why did you have a showing at the Twentieth Century-Fox for the critics?

A. It is our customary procedure, so that the local critics can express their views.

Q. You did not ask Ward Marsh his views, did you, after he saw the picture?

A. No. We never ask.

Q. I am asking, did you?

[fol. 1275] A. No, I did not.

Q. You did not ask Paul Mooney? Paul Mooney of the Cleveland Press as to his views after he saw the picture?

A. No, I didn't.

Q. You were content to rely upon the opinion of Hollis Alpert in the Saturday Review.

Isn't that right?

A. One.

Q. And Paul Beckley of the New York Herald Tribune in New York?

A. Another one.

Q. I see.

And you were not interested in what Ward Marsh thought about the film or about what Paul Mooney thought about the film?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Sustain the objection, and it is in the form of an argument.

Q. Were you interested?

By Judge McDermott:

Q. Were you interested?

A. I am always interested in reviews by anybody.

[fol. 1276] A. Of course.

Judge McDermott: That is his answer, and another question.

By Mr. Osborne:

Q. But to you their opinions weren't important enough for you to determine whether or not you should show the film?

Mr. Kleinman: Objection, if the Court please.

Mr. Osborne: I am asking him about the Cleveland critics. He has told us about the New York critics.

Judge McDermott: Now, just a moment, gentlemen.

(Conference held at this time of the three judge panel:)

By Judge McDermott:

Q. Can you answer that last question?

A. Yes, as I said before, I am interested in all reviews, and I was interested in what Paul Mooney had to say and the other reviewer, Ward Marsh, but Ward Marsh's review did not appear until Friday.

By Judge McMahon:

Q. Until after the showing?

A. Yes.

[fol. 1277] By Mr. Osborne:

Q. But these critics in Cleveland saw the film on Tuesday; right?

A. Yes.

Q. And you did not show that film until Thursday; right?

A. Yes.

Q. Between Tuesday and Thursday you had no contact with Ward Marsh about his opinion?

A. No, sir. We never discuss their opinions.

Q. I am not asking you about what you never did, but I am asking you about Tuesday and Thursday, and between Tuesday and Thursday you had no contact with Paul Mooney of the Cleveland Press to find out what his opinion was toward the film?

By Judge McDermott:

Q. Yes or no?

Judge Pincura: If I understood it right, he read the critic's reports locally before the picture was shown, except Marsh.

By Mr. Osborne:

Q. You read Mooney's review?

A. I read Paul Mooney's review on Wednesday, and I did not have any contact with the men, but I read that on Wednesday.

[fol. 1278] Q. And that did not deter you from showing the film?

A. Not Paul Mooney's review.

Q. Now, you knew, sir, that Ward Marsh was far more acquainted with this community than Hollis Alpert of New York?

Mr. Kleinman: Objection, if the Court please.

By Judge McDermott:

Q. If you know.

A. No, I didn't.

By Mr. Osborne:

Q. Didn't that pass through your mind?

A. No.

Q. You were going on the basis of a critic's review or reviews made in New York, is that right?

A. As far as the picture is concerned; yes.

Q. Now, you knew that Mr. Mooney was far more acquainted with this community than Mr. Beckley, Paul Beckley of the Tribune was in New York?

A. Oh, not exactly.

Q. That did not pass through your mind, Mr. Jacobellis?

A. I did not think in those terms.

Q. As a matter of fact, it didn't matter to you what [fol. 1279] Marsh would say or what Mooney would say?

Mr. Kleinman: Objection, and that is argumentative.

Q. I mean in determining whether or not you should show the picture?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Let him answer, and would that make any difference?

The Witness: I read and respect everybody's opinion, but in this particular case I read Paul Mooney's review on Wednesday, and I read Ward Marsh's review late on Friday.

Q. You read Ward Marsh's review late on Friday?

A. Yes.

Q. Friday, November 13, 1959?

A. Yes.

Q. What time did you read that?

A. I don't remember, but sometime in the afternoon.

Q. After reading Ward Marsh's review on Friday, November 13th, you still proceeded to show the picture that night?

Mr. Terrell: I object, if the Court please.

[fol. 1280] By Judge McDermott:

Q. Yes or no?

A. Yes.

By Mr. Osborne:

Q. And you not only showed that once, but you were in the middle of the second showing after reading Ward Marsh's review, before that was stopped?

A. Yes, that is correct.

Q. Then, your opinion of the critics' reviews had nothing to do with your showing of the picture; isn't that right?

Mr. Kleinman: Objection, if the Court please.

Judge McDermott: Now, just a moment, gentlemen.

(Conference held at this time of the three judge panel.)

Mr. Osborne: This is about his motivation.

Mr. Terrell: No editorial comment here.

Judge McDermott: Now, wait a minute gentlemen, and behave yourselves. You have been doing right well for the past several weeks that this case has been on trial.

[fol. 1281] (Conference of the three judge panel resumed at this time.)

Judge McDermott: Court feels that this is a pertinent question, and he may answer, and should answer.

Overrule the objection.

The Witness: The question, may I have it?

Judge McDermott: Read it to him, Mr. Sato.

(Question read back.)

Mr. Terrell: Read that to him again, Mr. Sato.

(Question read back again.)

By Judge McDermott:

Q. Yes or no?

A. The opinion of the critics; is that correct?

Q. Yes.

By Judge McMahon:

Q. Do you understand the question?

A. I understand if the opinion of the critic had anything to do with my showing of the picture, and we are talking about critics in general, and in that particular case I must answer yes.

Judge McDermott: That is his answer, yes, and let it [fol. 1282] stand.

[fol. 1330]

IN THE COURT OF COMMON PLEAS

DEFENDANT'S EXHIBIT G-a-1

(See opposite) ☞

For Better, for Worse

THE LOVERS. *Zenith. Produced and directed by Louis Malle.*

"Honi soit qui mal y pense" seems like the natural defense, if one is needed, for the French moviemakers responsible for "The Lovers." It is a completely amoral tale and it contains one of the longest and most sensuous love scenes to be seen in this country since Hector was a juvenile delinquent. Yet it has won high praise in France and a prize at the Venice Film Festival. Its young director, Louis Malle, who also wrote it, describes it as "very moral. It is the story of a woman who is led out of a spiritual desert by love." There is nothing dark or seamy-sided in the treatment of her adultery; the sun shines bright, the moon glimmers pure, the whole thing is almost matter of fact.

The woman is a pretty, rather intense 30-year-old mother (Jeanne Moreau). Her desert is populated by a husband (Alain Cuny), whose main interest is publishing his provincial newspaper, and a polo-playing lover in Paris who is beginning to be a bore. She has a 7-year-old daughter, a big, comfortable, old-fashioned house, and plenty of money, but her life seems to lack zest.

What happens is simple enough. One day when her car breaks down on her way back from Paris to Dijon she gets a ride home with a serious young archeologist (Jean-Marc Bory). The husband invites him to spend the night. He does and, by Georges, bumps into Mlle. Moreau in her negligee in the moonlight. That starts it. The next morning, without a word of explanation to anyone, they leave together—for better or for worse. That ends it.

▶**Summing Up:** Thou shalt not, but ...

[fol. 1331]

IN THE COURT OF COMMON PLEAS

DEFENDANT'S EXHIBIT H-1

(See opposite) ☞

Love Story

LOUIS MALLE, a French director who only recently celebrated his twenty-seventh birthday, has caused a considerable stir in Paris with "Les Amants," which will open here shortly as **"The Lovers."** The reason for the excitement is clear enough. Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair; he has kept, it seems to me, within the bounds of good taste; and, at appropriate moments, he has been entirely explicit about certain of the more sensuous aspects of love. Something of a sexual revolution appears to be going on in the cinema, and Malle may well be one of its prophets. He seems almost frighteningly knowledgeable about the nature of physical passion, and, more important, he has found a way to be expressive in a medium which, for half a century, has been a prisoner of convention when it came to dealing with its favorite subject matter: the varieties of love.

Malle, who is the author of the screenplay as well as its director (it was taken from a novel, "Point de Lendemain"), had the assistance of that clever, subtle writer, Louise de Vilmorin, on the always spare and unsentimental dialogue. Malle received his training while working with Jacques-Yves Cousteau and Robert Bresson, and it is possible to see the latter's influence, particularly. There is the same ring of truth, a similar poetic realism. The story itself is a simple one: it is about a married woman of thirty, highly civilized, who finds herself suddenly, startlingly, transformed into a creature of love. The spark occurs under seemingly innocuous circumstances, when her car stalls on the road from Paris to Dijon, she is helped by a young archeologist, who drives her to the country home. In a matter of hours her well-regulated life is at an end. From there on it is only love and uncertainty.

marriage, a child well looked after by servants and nurse-maids. Her husband is overly occupied with his work, and when he approaches his wife it is less with ardor than with jealousy. The jealousy is well founded enough, for she has found herself a lover in Paris, a polite, athletic, empty-headed rich bachelor. He helps fill the emptiness, alleviate the boredom. But she becomes as impatient with him as with her husband.

The young man who has aided her is invited to spend the night by the husband; both find themselves walking alone in the moonlight, and they meet—and it is at this point that Malle becomes most evocative. There is silence as they walk through a misty landscape, as they slowly turn towards each other for the answer to emptiness. There is a casting off of reserve, and their discovery of their need for each other. It is in these terms that the story is told; and one must compliment Malle for the way he avoids those moments that might cause the tell-tale sniggers of embarrassment in the audience. It is the always evident sincerity and seriousness, which protect against the sleazy and the sensational. Lovemaking there is, and it is as explicit as anything ever done before on the screen, but one senses that it is not shown for the sake of providing a cheap, vicarious thrill, but so that we may be privy to what Malle obviously considers the most meaningful and symbolic moment in the lives of two people. I was reminded of a story by de Maupassant called "Moonlight," in which a priest watches a girl and a boy commit what in his eyes must be an act of sin, and yet he does not disturb them, but walks away with the sense that he has, after all, seen the inscrutable workings of God. In "The Lovers," Malle has come close to seizing the ineffable. He makes acceptable, too, the fact that these lovers must leave their previous lives.

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Malle, who is the author of the screenplay as well as its director (it was taken from a novel, "Point de Lendemain"), had the assistance of that clever, subtle writer, Louise de Vilmorin on the always spare and unsentimental dialogue. Malle received his training while working with Jacques-Yves Cousteau and Robert Bresson, and it is possible to see the latter's influence, particularly. There is the same ring of truth, a similar poetic realism. The story itself is a simple one: it is about a married woman of thirty, highly civilized, who finds herself suddenly, startlingly, transformed into a creature of love. The spark occurs under seemingly innocuous circumstances, when her car stalls on the road from Paris to Dijon, she is helped by a young archeologist, who drives her to [illegible] country home. In a matter of [illegible] her well-regulated life is at an end. From there on it is only love and uncertainty.

But the telling of this story is a poem, a picture about love, about the banked fires that lie within an individual. The face of Jeanne Moreau flawlessly mirrors the transformation of the woman. It is a cool well-bred face that we see at first, the corners of the lips turned down in boredom and faint desperation. The eyes are quiescent, disappointed, but one senses that something wild lurks behind them, waiting for an awakening. The woman has had a cold, frustrating less with ardor than with jealousy. The jealousy is well founded enough, for she has found herself a lover in Paris, a polite, athletic, empty-headed rich bachelor. He helps fill the emptiness, alleviate the boredom. But she becomes as impatient with him as with her husband.

The young man who has aided her is invited to spend the night by the husband; both find themselves walking alone in the moonlight, and they meet—and it is at this point that Malle becomes most evocative. There is silence as they walk through a misty landscape, as they slowly turn towards each other for the answer to emptiness. There is a casting off of reserve, and their discovery of their need for each other. It is in these terms that the story is told, and one must compliment Malle for the way he avoids those moments that might cause the tell-tale sniggers of embarrassment in the audience. It is the always evident sincerity and seriousness, which protect against the sleazy and the sensational. Lovemaking there is, and it is as explicit as anything ever done before on the screen, but one senses that it is not shown for the sake of providing a cheap, vicarious thrill, but so that we may be privy to what Malle obviously considers the most meaningful and symbolic moment in the lives of two people. I was reminded of a story by de Maupassant called "Moonlight," in which a priest watches a girl and a boy commit what in his eyes must be an act of sin, and yet he does not disturb them, but walks away with the sense that he has, after all, seen the inscrutable workings of God. In "The Lovers," Malle has come close to seizing the ineffable. He makes acceptable, too, the fact that these lovers must leave their previous lives, and regardless of all the conventions they live by, set out together on another road. To do this in such a way that we are not shocked, but convinced, strikes me as a notable achievement. Does this mean that Malle is not only condoning adultery, but approving this well-known crime against society? Not at all; he has told a story as he has seen it, and followed it to its inevitable conclusion. The judgments, I fear, are up to us.

—Hollis Alpert.

NEW YORK
Herald Tribune
SUNDAY, NOVEMBER 8, 1959

Movies

Malle's 'Lovers' Is a Moral Work

By PAUL V. BECKLEY

In the spirit of interpretation rather than criticism, I should like to offer my own view of "The Lovers," Louis Malle's controversial French film, as a distinctly moral work. On close inspection, in fact, the works so far seen here by the popularly called "angry young men" of England and those I have seen thus far by the so-called "new wave" of French directors, of which Malle is one, are basically concerned with moral questions. Their point of view, whether implicit as in "The Lovers" or trumpeted as in "Look Back in Anger," is one of irony or impatience with the conventional pretenses which they feel blanket corruption.

Too often there is a tendency to concentrate our attention on certain sequences or incidents as on the goings-on in the heroine's bedroom in "The Lovers," and thus overlook the import of the body of the work, which is like brushing aside all but the bawdy details in "Macbeth," "Tom Jones" or "The Wife of Bath's Tale."

The moral intent of the artist is not always obvious. Whatever his viewpoint morally, his artistic responsibility lies in creating his characters as much like human beings as possible. [illegible] can only lead some immature minds, aware of some evidence of successful villainy around them, to believe that the downfall of all cinematic villains is mere propaganda. Here, I suspect, lies the weakness of the censorial approach, which, though it may be correct in principle, ends by defeating itself. For some minds the reduction of such downfalls to formalistic artifice destroys the intended moral point and leads to implicit or explicit approval of the villainy which is to them at least more exciting.

Rage Appeased?

If all the violence were expunged from all the movies, it is doubtful all taste for it would be erased. On the contrary, it might well be advanced that an effort to do so would have the opposite effect since it would expunge also the artist's ability to express the shortcomings of violence as a means of coping with the problems of life. In considering the growing taste for violence on the screen one can think of many contributing social factors. For those who did not actually fire into Germany troops during World War II has there ever been any complete satisfaction of the rage that the emotions of war aroused?

For "The Lovers," Louis Malle and Louise de Vilmorin re-wrote and up-dated an eighteenth century short story, "Point de Lendemain," dating from about 1780, written by Vivan Denon, who by occupation was an archeologist — an interesting fact because the successful lover in the film is also an archeologist. Miss Vilmorin and Malle worked on the screenplay about two months and because of their familiarity with the bourgeoisie in contemporary France took their characters from that social group.

Some viewers have found the first half of Malle's film dull, although, to me it was an irresistible and deliciously ironic study of the superficialities and [illegible] boredom of both the well-to-do country set and the [illegible] fashion sophisticates of Paris. That Malle has imbued this part of his film with such [illegible] humor and such a superficial gloss might lead some observers, more affected by a material philosophy than they suspect, to conclude that he is expressing satisfaction with it. But the ironic attitude is very definite. Throughout this segment the heroine's plight is explained in a background narrative in her voice, which has all the self-pitying stiff but very polite lover who plays polo.

It is in the second half of the film that the scenes of passion occur but not between the heroine and the polo player, rather with a young archeologist who offers Miss Moreau a lift when her car breaks down as she is hurrying home for the week end. At the dinner table that evening both her husband and her lover annoy her and she ends up by discovering in a moonlit moment that in the archeologist she has found "true love."

A Motive

That Malle made his scenes of passion so strong was necessary in order to give this woman a motive for driving away with her archeologist while her husband and guests stand gaping on the lawn, burdened with fishing gear for an early morning bout of country sport. But one need only consider the poignant scene in which the silly creature kisses her sleeping daughter good by or her frantic doubts as she drives off into a future conceivably cluttered with motels and archeological digs to realize that Malle is by no means expressing approval of her behavior or her ultimate decision.

On the contrary, he is pointing up the absurdities of human behavior which can result from becoming mired in an en-

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The moral intent of the artist is not always obvious. Whatever his viewpoint morally, his artistic responsibility lies in creating his characters as much like human beings as possible both in their weaknesses and their strengths and in describing their behavior as much like that one would reasonably expect of such people. If Disney's over-dressed wolf and cat singing of chicanery as "the life for me" is one of the pleasantest episodes of his "Pinocchio," it is not meant to persuade any one that villainy will lead to ultimate satisfaction.

On a strictly moral level, one could argue that when crime is shown in so many films to lead to ultimate material defeat it can only lead some immature minds, aware of some evidence of successful villainy around them, to believe that the downfall of all cinematic villains is mere propaganda. Here, I suspect, lies the weakness of the censorial approach, which, though it may be correct in principle, ends by defeating itself. For some minds the reduction of such downfalls to formalistic artifice destroys the intended moral point and leads to implicit or explicit approval of the villainy which is to them at least more exciting.

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Some viewers have found the first half of Malle's film dull, although to me it was an irresistible and deliciously ironic study of the superficialities and spiritual boredom of both the well-to-do country set and the "arty" fashion sophisticates of Paris. That Malle has imbued this part of his film with such atmospheric humor and such a superficial gloss might lead some observers, more affected by a material philosophy than they suspect, to conclude that he is expressing satisfaction with it. But the ironic attitude is very definite. Throughout this segment the heroine's plight is explained in a background narrative in her voice, which has all the self-pitying sentimentality of a "confession" magazine.

Seductive

This seductive creature, played beautifully by Jeanne Moreau, is suffering from neglect in a magnificent little country villa which she shares with an earnest and faithful husband who works too assiduously at his job of country editor. There is also a charming and affectionate daughter and a band of retainers obedient to the heroine's every wish. In addition her husband tolerates her dashing up to Paris every week to pick up bits of emotional reassurance from a stiff but very polite lover who plays polo.

It is in the second half of the film that the scenes of passion occur but not between the heroine and the polo player, rather with a young archeologist who offers Miss Moreau a lift when her car breaks down as she is hurrying home for the week end. At the dinner table that evening both her husband and her lover annoy her and she ends up by discovering in a moonlit moment that in the archeologist she has found "true love."

A Motive

That Malle made his scenes of passion so strong was necessary in order to give this woman a motive for driving away with her archeologist while her husband and guests stand gaping on the lawn, burdened with fishing gear for an early morning bout of country sport. But one need only consider the poignant scene in which the silly creature kisses her sleeping daughter good by or her frantic doubts as she drives off into a future conceivably cluttered with motels and archeological digs to realize that Malle is by no means expressing approval of her behavior or her ultimate decision.

On the contrary, he is pointing up the absurdities of human behavior which can result from becoming mired in an environment where form and conventions take the place of reality. If he does not express his disapproval in a providential car crash as the lovers escape, he does manage to leave the viewer with a sense of shock, a sense of tragedy that is all the more affecting after the leisurely sensuousness of the early sequences and the sensual abandon of the latter. Everything, including certainly his astute and sensitive camera work, contributes to this final sense of discomfort. Thus, there can be no question but that so knowing a director intended to do just what his film in fact does.

[fol. 1333]

IN THE COURT OF COMMON PLEAS

DEFENDANT'S EXHIBIT J

(See opposite) ☞

Movie Review by Paul V. Beckley

'The Lovers'

PARIS THEATER

A screen play written and directed by Louis Malle based on the novel "Point de Lendemain" by Dominique-Vivant, presented by Zenith International Film Corp. with the following cast:

Jeanne	Jeanne Moreau
Henri	Alain Cuny
Raoul	Jose-Luis de Villalonga
Bernard	Jean-Marc Bory
Maggy	Judith Magre
Servant	Gaston Modot

"The Lover's" is obviously not intended for the young, although it was made by one of France's younger directors, Louis Malle, who also did the screen play. He based it on a nineteenth-century novel "Point de Lendemain," but set it in contemporary France.

The first half of the picture flows in a leisurely fin de siecle dignity for all its contemporaneity, depicting quietly and with a fine sense of style the plight of Jeanne Moreau as the wife of an inattentive country editor. She spends progressively longer vacations in Paris with a flighty girlhood friend (Judith Magre) and a lover (Jose-Luis de Villalonga) until finally her husband (Alain Cuny) in a flurry of irony insists she invite both friend and lover for a week end of country life.

It is the second half of the film that becomes frenzied, romantic, dramatic, comic, or outrageous (depending on the attitude or sense of humor of the audience but above all as likely a subject of controversy as anything we have seen recently on film.

For on the way back to her country house Miss Moreau's car breaks down and she is picked up by Jean-Marc Bory, who plays a relative of Miss Moreau's Parisian friends but who himself prefers archeology to fashion, shuns his relatives, and has a strong distaste for speed. He dawdles along the road and at one point stops to sip wine for an hour with an old friend until Miss Moreau is frantic, knowing that her lover and her husband are going to meet before she can arrive.

But Bory is slow only with a motor. He gravely, she [illegible]

Jean-Marc Bory and Jeanne Moreau in "The Lovers."

(next to her husband's), engage in some of the frankest love scenes yet seen on film, talking at times so morally that one wonders if Bory has forgotten that French country gentlemen commonly keep shotguns in their homes, finally riding off next morning in his small car as the fishing party stands on the lawn and stares.

* * *

The point is that throughout it is beautifully made with a fine feeling for tone and pace. Malle's technique is very sharp but always subordinated to his material so that one is never conscious of trickiness for its own sake. His own point of view moves so subtly under the surface of events that one is not always sure when he is flipping water in one's eyes. There are moments when his obvious delight in the absurdities of human behavior, the preciousness of the "conventional" unconventional cannot be mistaken.

There is his ironic handling

flows in a leisurely fin de siecle dignity for all its contemporaneity, depicting quietly and with a fine sense of style the plight of Jeanne Moreau as the wife of an inattentive country editor. She spends progressively longer vacations in Paris with a flighty girlhood friend (Judith Magre) and a lover (Jose-Luis de Villalonga) until finally her husband (Alain Cuny) in a flurry of irony insists she invite both friend and lover for a week end of country life.

It is the second half of the film that becomes frenzied, romantic, dramatic, comic, or outrageous (depending on the attitude or sense of humor of the audience but above all as likely a subject of controversy as anything we have seen recently on film.

For on the way back to her country house Miss Moreau's car breaks down and she is picked up by Jean-Marc Bory, who plays a relative of Miss Moreau's Parisian friends but who himself prefers archeology to fashion, shuns his relatives, and has a strong distaste for speed. He dawdles along the road and at one point stops to sip wine for an hour with an old friend until Miss Moreau is frantic, knowing that her lover and her husband are going to meet before she can arrive.

But Bory is slow only with a motor. He gravely observes the jealous sarcasm of the husband, the embarrassed inability of the lover to deal with the husband's too-pointed double meanings, and after the family goes to bed early in order to rise at 4 a.m. for a fishing trip, he slips a recording of Schubert's "Death and the Maiden" on the phonograph and waits with a drink in his hand on the greensward until she comes down to turn off the machine, which is directly beneath her bedroom.

She, too, makes herself a drink and in her nightgown steps outdoors to walk off her distemper, running into the waiting Bory. She is intolerant, but he is persistent, and by the time their drinks are finished they are gliding in a rowboat (not bothering with the oars) down a creek that crosses her husband's property.

They return to her room

Jean-Marc Bory and Jeanne Moreau in "The Lovers."

(next to her husband's), engage in some of the frankest love scenes yet seen on film, talking at times so morally that one wonders if Bory has forgotten that French country gentlemen commonly keep shotguns in their homes, finally riding off next morning in his small car as the fishing party stands on the lawn and stares.

* * *

The point is that throughout it is beautifully made with a fine feeling for tone and pace. Malle's technique is very sharp but always subordinated to his material so that one is never conscious of trickiness for its own sake. His own point of view moves so subtly under the surface of events that one is not always sure when he is flipping water in one's eyes. There are moments when his obvious delight in the absurdities of human behavior, the preciousness of the "conventional" unconventional cannot be mistaken.

There is his ironic handling of the first half of the film, which leaves no reasonable doubt of his personal attitude about the posturing of Miss Moreau and her friend on the sidelines of a polo match or the very correct courtship of her lover. There is the nice observation that Miss Moreau is in need of the "reassurance" of well modulated compliments. There is above all the self-pitying "I was a country wife who went wrong" moan of the off-screen narration.

The fact that all this can be taken seriously enough, that in part Malle intends it should be, that in this sense it is always psychologically astute and pictorially beautiful and atmospherically "right," only confirms the ironic, amused, highly sophisticated, tongue-in-cheek viewpoint that invades his whole film like an olive in a Martini.

[fol. 1334]

IN THE COURT OF COMMON PLEAS

DEFENDANT'S EXHIBIT K

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
NEW YORK 4, N. Y.

[Emblem]
OFFICE OF THE COLLECTOR
DISTRICT No. 10

ADDRESS REPLY TO
COLLECTOR OF CUSTOMS

April 23, 1959

IN REPLY REFER TO
IF:al
E-490131
YOUR FILE

Mr. Arthur H. Schwartz,
Counsellor at Law
19 E. 70th St.
New York 21, N. Y.

Sir:

Your client, Mr. Daniel Frankel, has suggested that in his absence we advise you of the result of our consideration of the supplemental petition submitted on March 20th for the release of the film entitled LES AMANTS, entered by Zenith International Film Corporation under Entry 490131 of February 6, 1959.

The Bureau of Customs at Washington has informed this office that upon a review of the matter and examination of the film it is now of the opinion that it is not obscene within the meaning of Section 305 of the Tariff Act.

The film in question will be released.

Very truly yours,

ROBERT W. DILL, Collector

By: /s/ IRVING FISHMAN
Irving Fishman, Deputy Collector
Restricted Merchandise Division

'Lovers' in Paris

THE LOVERS (Les Amants); written and directed by Louis Malle; from the novel, "Point de Landemain," by Dominique Vivant; narration by Louis Valentin; produced by Nouvelles Editions des Films; released by the Cocinor International Films Corporation. At the Paris Theatre, 4 West Fifty-eight Street. Running time: ninety minutes.

Jeanne Tournier	Jeanne Moreau
Bernard Tournier	Alain Cuny
Raoul Torres	Jose-Luis de Villalonga
Reynald Langlois	Jean-Marc Bory
Maggy	Judith Magre
Servant	Gaston Modot

HAVING been preceded by both the fanfare of honors and the stigma of censorship, "The Lovers," which opened at the Paris Theatre from France yesterday, is less a bombshell than a letdown. For the import, a prize-winner at the Venice Film Festival, which also reportedly was struck down by bans in several other European areas evolves only as a truly tender and compassionate examination of a sudden torrid love affair. Unfortunately, it is weighted down by an abundance of saccharine and obvious preliminaries so dear to

through a succession of introductory, uninspired, familiar scenes to establish the film's central action. Our heroine, it appears, is drawn to Paris from her country manse in Dijon because her husband, a jaded and introspective newspaper publisher, is closer to his business than the business of romance. The light of her life in the City of Light is a well-bred, rich polo player and she is almost ready to heed his flowery blandishments when she conveniently meets our hero en route home to a party. And, an observer is forced to wonder, despite the poetic, off-screen narration, is love at first sight ever as precipitous as presented here.

In Miss Moreau, however, M. Malle has the services of one of France's top-flight [illegible] To judge by her contribution to "The Lovers," The actress, to put it into a nutshell, is superb. As a woman torn by conventions, a need for love, a knowledge of the superficialities of the Parisian haute monde and her ecstatic discovery of romantic fulfillment for which she sacrifices home, husband and child, Mlle. Moreau seems to be living, rather than playing, a role.

M. Bory is handsome and [illegible] on occasion, an understanding [illegible] foil for her. Alain Cuny is properly dour and suspicious as the husband, and José-Luis de Villalonga, as the polo enthusiast, and Judith Magre, as Mlle. Moreau's pleasure-loving Parisian friend, are simply glib and attractive.

In short, M. Malle should be eternally grateful for his [illegible] Mlle. Moreau and the film's evocative and torrid encounter[illegible]al sequences. Without them, "The Lovers" is a tedious and tepid affair.

A. H. WEILER.

...Vilmorin; produced by Nouvelles Editions des Films; released by the Zenith International Films Corporation. At the Paris Theatre, 4 West Fifty-eight Street. Running ninety minutes.

Jacques Tournier	Jeanne Moreau
Pierre Tournier	Alain Cuny
Raoul Torres	Jose-Luis de Villalonga
Bernard Langlois	Jean-Marc Bory
Maggy	Judith Magre
Serviat	Gaston Modot

HAVING been preceded by both the fanfare of honors and the stigma of censorship, "The Lovers," which came to the Paris Theatre from France yesterday, is less a bombshell than a letdown.

For the import, a prize-winner at the Venice Film Festival, which also reportedly was struck down by bans in several other European areas evolves only as a truly tender and compassionate examination of a sudden torrid love affair. Unfortunately, it is weighted down by an abundance of saccharine and obvious preliminaries so dear to the hearts of the confessional magazine readers.

But Louis Malle, the 28-year-old writer-director, a prime exponent of the so-called "new wave" of young French film artists now enjoying popularity, certainly has been explicit and incisive in his handing of the film's major sequences. His principals—Jeanne Moreau, portraying a bored young matron who is suddenly and explosively catapulted into the grandest of passions by an equally youthful archaeologist, played by Jean-Marc Bory—appear to be as close to authentic amour as is possible on screen.

•

Spokesmen for the film's distributors admit that the film has been cut here and there so that the local version and the feature currently engrossing Parisians may not be exactly alike. This, it would appear, is of small moment. M. Malle, who served as a camera man on the noted documentary "The Silent World," proves again that he is no stranger to film techniques.

With the aid of simple but pointed dialogue, his shots of the lovers meeting by chance in a moonlit garden, walking hand in hand through fields and forest, by a millwheel to the sounds of a gurgling stream, and making love in a drifting boat and in the quiet of a manor house are strangely beautiful evocations of love.

However, a viewer is forced to heed his flowery blandishments when she conveniently meets our hero en route home to a party. And, an observer is forced to wonder, despite the poetic, off-screen narration, is love at first sight ever as precipitous as presented here.

In Miss Moreau, however, M. Malle has the services of one of France's top-flight performers to judge by her contribution to "The Lovers." The actress, to put it into a

[fol. 1336]

IN THE COURT OF COMMON PLEAS

STATE'S EXHIBIT 7-A

(See opposite) ☞

When all conventions explode... in the most daring love story ever filmed!

"This film is the one to

the Lovers

starring Jeanne MOREAU - Jean Marc BORY

Starts TONITE! At 7:15, 9:05

RIALTO

YE 2-5515

[fol. 1337]

IN THE COURT OF COMMON PLEAS

MEMORANDUM OF THE COURT OF COMMON PLEAS—
June 8, 1960

Before William J. McDermott, P.J., Ray F. McMahon, J., and John Pincura, J. (Pincura, J., Court of Common Pleas (Lorain County) sitting by designation in Cuyahoga County).

Per Curiam

The defendant was indicted on two counts under the provisions of Section 2905.34 of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers), and (2) unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers).

At the request of the defendant the cause was tried before a court of three judges under Section 2945.07 of the Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, filed in this cause and made a part of the record, all in accordance with the provisions of Section 2945.05 of the Revised Code.

In the motion picture "Les Amants" (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in pro-
[fol. 1338] tracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth* v. *United States* (June 24, 1957), 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. *"Les Amants"* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

Therefore, the Court finds the defendant guilty as charged in both counts of the indictment.

William J. McDermott, Presiding Judge, Roy F. McMahon, Associate Judge, John Pincura, Associate Judge.

[fol. 1339]

IN THE COURT OF APPEALS FOR CUYAHOGA COUNTY, STATE OF OHIO

OPINION—May 25, 1961

Per Curiam:

This is an appeal on questions of law from a judgment arising from a decision rendered by the Court of Common Pleas of Cuyahoga County (Criminal Division) finding the defendant guilty as charged on two counts of an indictment as follows:

"(1) Unlawfully and knowingly had in his possession and under his control a certain obscene, lewd,

and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers), and:

"(2) Unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers)."

The defendant elected to be tried before a court of three judges pursuant to Section 2945.07, Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, pursuant to the provisions of Section 2945.05, Revised Code. The trial was commenced on May 23, 1960 and concluded on June 3, 1960.

Section 2905.34, Revised Code, under which the defendant was convicted, insofar as pertinent, reads as follows:

"No person shall knowingly sell, lend, give away, exhibit or offer to sell, lend, give away or *exhibit*, or publish, *or have in his possession or under his control*, an obscene, lewd or lascivious book, pamphlet, paper, magazine, writing, advertisement, circular, print, picture, photograph, *motion picture film* * * *."

[fol. 1340] The defendant-appellant complains of many assignments of error, one of which is that he was erroneously charged and found guilty of two separate crimes under Section 2905.34, Revised Code, in that the first count charged the defendant with knowingly having possession and control of a certain obscene, lewd and lascivious motion picture film, to-wit: "Les Amants," and the second count with unlawfully and knowingly exhibiting this same motion picture film. This assignment of error cannot be sustained.

This precise question was before the Montgomery County Court of Appeals, where defendant was found guilty by a jury on two charges, namely, (1) possessing and (2) exhibiting an obscene motion picture film, "The Lovers," see opinion by Kerns, J., in *State* v. *Warth* (No. 2576), decided July 7, 1960. Appeal as of right to the Supreme Court dis-

missed *sua sponte* for reason no debatable constitutional question involved. *State* v. *Warth*, 172 Ohio St. 246, decided May 3, 1961. While the conviction in the *Warth* case was for violation of Section 2905.342, Revised Code, nevertheless, the legal principles involved are identical as applied to the facts of the instant case.

Also, this same question was before this court where one, Gevaras, was convicted in the Court of Common Pleas of this County on two counts of one indictment (1) of knowingly possessing and the other of knowingly exhibiting the same "obscene, lewd, or obscene motion picture film" under the provisions of Section 2905.34, Revised Code. On appeal on questions of law, this court affirmed the judgment of the Court of Common Pleas. Thereafter, the Supreme [fol. 1341] Court of Ohio dismissed the appeal as of right for the reason that "no debatable constitutional question" was involved. *State of Ohio, Appellee* v. *Gevaras, Appellant*, 170 Ohio St. 404, 165 N. E. 2d 652 (February 3, 1960).

The remaining assignments of error are grounded principally upon the claim of the defendant that the provisions of the statute, namely, Section 2905.34, Revised Code, are violative of the constitutional rights of the defendant and are, therefore, null and void.

The defendant contends that the moving picture film in this case is not obscene and that it is within the area of constitutionally protected freedom of speech or press.

This contention of the defendant cannot be sustained. As to the question of obscenity the three judge trial court, after a lengthy trial, based upon the testimony of numerous witnesses, the viewing of the film and all the evidence, found the moving picture film in question to be obscene, lewd and lascivious within the definition, description and test set forth in *Roth* v. *United States*, 354 U. S. 476.

In negating the claim that obscenity is within the area of constitutionally protected freedom of speech or press, the Supreme Court of the United States in paragraph three of the syllabus of *Roth* v. *United States*, 354 U. S. 476, which was considered and decided June 24, 1957, together with the case of *David S. Alberts* v. *California*, on appeal from the Superior Court of California, Los Angeles County, held, inter alia, as follows:

> "Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Govern-
> [fol. 1342] ment, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States."

And, in syllabus four (c) of the *Roth* case, *supra,* it is stated:

> "The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

Further, the court held in paragraph six of the syllabus, at page 477:

> "When applied according to the proper standard for judging obscenity, para. 311 of West's California Penal Code Ann., 1955, which, inter alia, makes it a misdemeanor to keep for sale or to advertise material that is 'obscene or indecent,' does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendment against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt."

The court, at page 487 of the *Roth* case, declared:

> "However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. . . ."

The trial court, in finding the defendant guilty as charged, was governed by the standards defined and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving picture film, "Les Amants," we agree with [fol. 1343] and adopt the same as part of our opinion in this case, as follows:

"In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

"In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

"It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in Roth v. United States (June 24, 1957), 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. 'Les Amants' (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this [fol. 1344] film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

"Therefore, the Court finds the defendant guilty as charged in both counts of the indictment."

As to each count of the indictment, the three judge court imposed a fine only.

Considering the record as a whole, including a viewing of the film by this court, the film being an exhibit in the case, we conclude that the judgment of guilty by the three judge court is amply sustained by the evidence and that no error intervened prejudicial to the rights of the defendant.

The judgment must be and, therefore, is affirmed.

Kovachy, P.J., Skeel, J., Hurd, J., concur.

[fol. 1345]

IN THE COURT OF APPEALS FOR CUYAHOGA COUNTY

Journal Entries

JUDGMENT—June 21, 1961

This cause came on to be heard on the appeal on questions of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellant its costs herein taxed. See per curiam opinion.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

To all of which appellant, by counsel, excepts.

July 25, 1961.

Motion by defendant-appellant to certify record to Supreme Court allowed by agreement of parties.

July 28, 1961.

On consideration of the motion of Nico Jacobellis to certify the record of this case to the Supreme Court of

Ohio on the ground of a conflict judgment, the Court finds that its judgment is in conflict with the judgment pronounced on the same question by the Court of Appeals of the Third Appellate Judicial District of Ohio in the case [fol. 1346] of State of Ohio v. Edward J. Wetzel, decided on the 10th day of December, 1960, and the motion is hereby sustained, and it is ordered that the record in this case be certified to the Supreme Court of Ohio for review and final determination.

[fol. 1347]

IN THE SUPREME COURT OF THE STATE OF OHIO

Case No. 37200

January Term 1961.

Certified by the Court of Appeals of Cuyahoga County.

STATE OF OHIO, Plaintiff-Appellee,

v.

NICO JACOBELLIS, Defendant-Appellant.

John T. Corrigan, Prosecuting Attorney, Thomas L. Osborne, Bernard J. Stuplinski, Asst. Prosecutors, Criminal Courts Bldg., Cleveland, Ohio.

Rocker, Zaller & Kleinman, Bennet Kleinman, Sheldon Berns, 1040 Leader Bldg., Cleveland, Ohio.

MEMORANDA OF PLEADINGS, &C., FILED, WRITS ISSUED, &C., JUDGMENTS, ORDERS AND DECREES

Date	
July 7, 1961	Court of Appeals Transcript of Docket and Journal Entries, Original Papers, Bill of Exceptions and Exhibits filed.
July 27, 1961	Additional Transcript and Original Papers filed.

Date	
August 4, 1961	Additional Transcript of Docket and Journal Entries filed.
August 10, 1961	Assignment of Errors and proof of service filed.
August 10, 1961	Cause docketed.
August 22, 1961	Leave granted to dispense with printing record. /s/ Carl V. Weygandt, Chief Justice. Journal 44, page 316.
September 6, 1961	Bill of Exceptions (3 volumes) sent Mr. Osborne. 9/21/61 Returned.
September 18, 1961	Leave granted to file appellant's brief instanter. /s/ Carl V. Weygandt, Chief Justice. Journal 44, page 338.
[fol. 1348]	
September 18, 1961	Appellant's printed brief and proof of service filed.
September 25, 1961	Appellee's printed brief and appendix to brief filed. 9/26/61 Proof of service filed.
October 16, 1961	Reply brief of appellant and proof of service filed.
January 17, 1962	Judgment affirmed. Journal 44, page 520.
January 23, 1962	Notified application for rehearing to be filed.
January 31, 1962	Notified further that no application for rehearing will be filed.
January 31, 1962	Mandate issued Common Pleas Court.
January 23, 1962	Original Papers and Bill of Exceptions and Exhibits sent to Clerk.
April 4, 1962	Entry staying execution of Mandate until final determination by the United States Supreme Court. /s/ Carl V. Weygandt, Chief Justice. Journal 44, page 624.

Date	
April 4, 1962	Entry issued to Clerk of Courts, Cuyahoga County staying execution of mandate pending final determination by United States Supreme Court.
April 12, 1962	Notice of Appeal to The Supreme Court of the United States, Precipe, and Certificate of Service filed.

[fol. 1349]

IN THE SUPREME COURT OF THE STATE OF OHIO

Journal Entries

Journal 44, Page 316
Entry

Upon application of appellant and for good cause shown, it is ordered that the printing of the record herein be, and the same hereby is, dispensed with, and that said cause will be heard upon the original record filed herein. /s/ Carl V. Weygandt, Chief Justice.

Journal 44, Page 338
Entry

Leave is hereby granted to file appellant's brief on the merits instanter. /s/ Carl V. Weygandt, Chief Justice.

Journal 44, Page 520
Certified by the Court of Appeals for Cuyahoga County.

ORDER APPEALED FROM

This cause, certified by the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the plaintiff-appellee recover from the defendant-appellant its costs herein expended;

that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of Court of Appeals for Cuyahoga County for entry.

Journal 44, Page 624
Entry

On written request by counsel for appellant, it is ordered that the Execution of the Mandate and Entry, in the above case, issued to the Clerk of Courts of Cuyahoga County on January 31, 1962, be stayed pending final determination by The Supreme Court of the United States. /s/ Carl V. Weygandt, Chief Justice.

[fol. 1350]

IN THE SUPREME COURT OF THE STATE OF OHIO

January Term, 1962

Statement of the Case

THE STATE OF OHIO, Appellee,

v.

JACOBELLIS, Appellant.

Criminal law—Possessing obscene literature—Section 2905.34, Revised Code, constitutional—Elements of offense—Scienter and mens rea necessary to sustain conviction—Rule of reason applied in construing criminal statute.

1. Section 2905.34, Revised Code, relating to obscenity is a valid exercise of the police power of the state of Ohio and was enacted for the protection of its citizens, and a proper conviction for a violation thereof will be sustained.

2. The words, knowingly possess, as used in Section 2905.34, Revised Code, include "scienter" (guilty

knowledge) and "mens rea" (guilty purpose), both of which must be established by proper evidence to sustain a conviction for violation of such section.

3. The courts must apply a rule of reason in construing and applying the criminal statutes of this state to the facts in each case.

(No. 37200—Decided January 17, 1962.)

Certified by the Court of Appeals for Cuyahoga County.

Defendant was indicted on two counts by the September 1959 Grand Jury of Cuyahoga County, Ohio, for violation of Section 2905.34, Revised Code. The first count in the indictment reads as follows:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

The second count in the indictment reads:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly exhibited a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

[fol. 1351] "Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

Section 2905.34, Revised Code, so far as it pertains to the defendant and his conduct on November 13, 1959, reads as follows:

"No person shall *knowingly* * * * exhibit * * * or have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film * * *.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

Upon arraignment the defendant entered pleas of not guilty to both counts of the indictment on November 30, 1959, and was released on bond.

On May 23, 1960, the defendant waived his right to trial by jury, both orally and in writing, and requested trial by a three-judge court. He was permitted to withdraw his pleas to make certain motions; thereafter the pleas of not guilty were re-entered and trial was had, resulting in a finding of guilty as charged in each count of the indictment.

The defendant was sentenced to pay a fine in the sum of $500 on the first count of the indictment and sentenced to pay a fine of $2,000 on the second count of the indictment and to stand committed to the workhouse of the city of Cleveland until such fine and costs were paid. Sentence was stayed pending appeal.

On the appeal to the Court of Appeals, that judgment was affirmed.

The cause is before this court pursuant to a certification of the record, the Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals of the Third Appellate District in the case of *State* v. *Wetzel*, decided December 10, 1960.

Mr. John T. Corrigan, prosecuting attorney, Mr. Thomas L. Osborne and Mr. Bernard J. Stuplinski, for appellee.

Mr. Bennett Kleinman, for appellant.

[fol. 1352]

OPINION—Decided January 17, 1962

Radcliff, J. At the outset it is well to recall that an opinion of this court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case.

The defendant urges five assignments of error, the first two raising the constitutional issues involved. The third and fourth emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion. The final assignment of error raises the question of general prejudice.

There is an oft-quoted cliche to the effect that "it is not possible to legislate in the field of morals." The statement originally was and still should be, "it is not possible to legislate morality for the people." In support of this, there is always cited the classic example of the Eighteenth Amendment to the United States Constitution. We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to re-elect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the

judiciary is farthest from the people because of the length of tenure or mode of selection, consequently its authority must be exercised with deliberate caution. *Lex citius tolerare vult privatum damnum quam publicum malum.*

We turn now to a consideration of the provisions of [fol. 1353] Section 2905.34, Revised Code, in relation to the various pronouncements of the Supreme Court of the United States in interpreting such statutes. The pertinent part of Section 2905.34, Revised Code, with which we are presently concerned, reads as follows:

"No person shall *knowingly* sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene * * * motion picture film * * *." (Emphasis added.)

At the outset it must be noted that the Supreme Court of the United States has held that obscenity is not protected by the constitutional provisions relating to freedom of speech. *Roth* v. *United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct., 1304.

In *Smith* v. *California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215, however, the Supreme Court struck down a state statute which imposed strict criminal liability for the mere possession for sale of an obscene book, without requiring any knowledge of the contents of the book. The case reserved, however, the question as to the extent of knowledge required which would validate such a statute.

Such infirmity does not exist in the statute under our consideration. It is specifically required under Section 2905.34, Revised Code, that the acts punished thereunder shall be done knowingly. The act requires knowledge. The question, of course, is knowledge of what. It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved.

Two questions must be determined at this time. First, the test as to what is obscene. The definition which has now become classic was laid down in *Roth* v. *United States*, *supra*, as follows, at page 489:

"* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene. There is no real or actual ambiguity in the phrase. No undue [fol. 1354] burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards, and as stated in *Roth* v. *United States, supra,* at pages 491 and 492:

"Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. * * * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * * .' *United States* v. *Petrillo,* 332 U. S., 1, 7-8 [91 L. Ed., 1877, 67 S. Ct., 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark * * * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * * . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * * ."

The second question which arises is as to what extent a person is bound to have knowledge of the contents of that which he possesses. To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be presumed to know what they are dispensing. (*State* v. *Wetzel,* 173 Ohio St., 16.) It is in the more ethereal region of theoretical literary endeavor that the principal problem arises. Here, once again, the community must be the test. A commercial possessor obviously can not be held to the duty of examining and

determining for himself the obscenity of all matters which pass through his hands, neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above [fol. 1355] test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under Section 2905.34, Revised Code.

Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section.

That there are marginal cases where such determination is difficult does not invalidate an otherwise valid enactment. *Roth* v. *United States*, *supra*, and *State* v. *Wetzel*, *supra*.

The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.

It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole.

In the phrase, "knowingly possess," as used in criminal statutes, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable to us that a violation of Section

2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and acts in furtherance thereof.

When this phrase is read in context with and in relation to the rest of the section, it is readily apparent that such phrase does not relate to the mere possession for private and personal gratification but rather to possession and con- [fol. 1356] trol for the purpose of circulation or exhibition, a matter clearly within the power of the state to control under the police power.

The third and fourth assignments of errors raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums. The facts were found by the three judges sitting as the triers of the facts who applied the standards prescribed in *United States* v. *Roth*, *supra*, and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i.e.*, filth for filth's sake. It was worse. It was filth for money's sake. The producers, distributors and exhibitors evidenced so little responsibility in connection therewith that they have no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection. This is especially apropos of the First and Fourteenth Amendments to the Constitution of the United States.

There is a unique coincidence involving this case, (*State* v. *Jacobellis*) and the case of *State* v. *Warth*, 173 Ohio St., 15, as the obscene material involved in both was Les Amants (The Lovers). However, the statute involved in each case is entirely different. Jacobellis was indicted, tried and convicted for violation of Section 2905.34, Revised Code. Warth was indicted, tried and convicted for violation of Section

2905.342, Revised Code. The latter statute attempted to make *mere* possession or exhibiting an obscene motion picture film a misdemeanor. In view of the pronouncements of this court in *City of Cincinnati* v. *Marshall*, 172 Ohio St., 280, 175 N. E. (2d), 178, and of the Supreme Court of the United States in *Smith* v. *California*, *supra*, and our high regard for the doctrine of *stare decisis*, the conviction of Warth was reversed due to the constitutional infirmity of Section 2905.342, Revised Code, in omitting the element of scienter or knowledge. The cases in reality had no common principle of law involved, and, consequently, the different conclusion reached in each can not provoke any possible [fol. 1357] question of inconsistency. Had Warth been charged in Montgomery County with a violation of Section 2905.34, Revised Code, he would have been as guilty as we now find Jacobellis in Cuyahoga County.

As we find no error in the judgment of the Court of Appeals, such judgment is hereby affirmed.

Judgment affirmed.

Zimmerman, acting C. J., Matthias, Bell and O'Neill, JJ., concur.

Herbert, J., dissents.

Zimmerman, J., sitting in the place and stead of Weygandt, C. J.

Radcliff, J., of the Fourth Appellate District, sitting by designation in the place and stead of Zimmerman, J.

TAFT, J., concurring in part. I cannot be as positive in condemning the film involved in the instant case as the majority opinion is. However, in my opinion, reasonable minds could determine beyond a reasonable doubt that this film is, to use the words of the statute, "obscene, lewd, or lascivious."

I agree, therefore, with the judgment so far as it relates to the second count of the indictment charging defendant with exhibiting that film.

I also agree with the majority opinion that the word "knowingly" in the statute relates not merely to possession and control of the film but also to what is in the film.

However, I cannot agree with the judgment of this court, to the extent that it affirms the conviction of defendant on the first count charging defendant merely with knowingly possessing and having control of the film.

It is my opinion, as it was the opinion of Judges Bell, Peck, Herbert and myself in *State* v. *Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, that the portion of the statute upon which the first count is based is constitutionally invalid. As stated in the opinion in that case:

"If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime * * *. As a result, some who might otherwise read books that are [fol. 1358] not obscene may well be discouraged from doing so and their free circulation and use will be impeded."

Likewise, under this statute, if anyone looks at a movie film that he has lawfully acquired to determine whether he should exhibit it and finds it to be obscene, he is forthwith and at that instant guilty of a serious crime. As a result, some who might otherwise look at movie films that are not obscene to determine whether they should exhibit those films may well be discouraged from doing so and free circulation and exhibition of movie films will be impeded.

If Section 2905.34, Revised Code, providing that "no person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film" were reasonably susceptible of interpretation as a prohibition of possession or control of such a film only where such possession or control was for the circulation or exhibition thereof, I could also concur in the judgment so far as it affirms the conviction on the first count. Apart from some consideration of the legislative history of this statute, this court *might* be justified in proclaiming that there was a legislative intent that the "possession * * * or control," in order to be a crime, must be, to use the words of the majority opinion, "for the purpose of circulation or exhibition." But compare *State* v. *Warth*, 173 Ohio St., 15. As the majority opinion states, this matter is clearly within the power of the state to control under the police power.

It may be observed that it is probable that such a judicial proclamation of legislative intent would be helpful, if not

conclusive, in avoiding a review by the United States Supreme Court of the constitutional validity of this portion of our statute.

However, the General Assembly has quite clearly indicated that it had no such intention. Thus, prior to 1939, the foregoing statute (then Section 13035, General Code) read so far as pertinent:

"Whoever sells, lends, gives away [*i. e.*, circulates], exhibits * * * or has in his *possession for such purpose,* an obscene [etc.]." (Emphasis added.)

In that year, the General Assembly amended that statute by taking out the words "for such purpose" appearing after [fol. 1359] the word "possession," and added, after the latter word, the words "or has under his control." 118 Ohio Laws, 420.

The General Assembly thus quite clearly expressed a legislative intention not to modify the words "has in his possession or under his control" as the majority opinion and the decision in the instant case are modifying those words.

[fol. 1360]

IN THE COURT OF COMMON PLEAS

CRIMINAL DIVISION—STATE OF OHIO

COUNTY OF CUYAHOGA

No. 72175

STATE OF OHIO, Plaintiff-Appellee,

v.

NICO JACOBELLIS, Defendant-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 12, 1962 in the Supreme Court of Ohio

I. Notice is hereby given that Nico Jacobellis, the appellant above named, hereby appeals to the Supreme Court

of the United States from the final judgment of the Supreme Court of the State of Ohio, entered herein on January 17, 1962, affirming the judgment of the Court of Appeals of Cuyahoga County, State of Ohio, which affirmed a judgment rendered by the Court of Common Pleas of Cuyahoga County (Criminal Division), State of Ohio, finding the appellant guilty on two counts of an indictment.

This appeal is taken pursuant to 28 U.S.C.A. §1257 (2).

Appellant was convicted under Section 2905.34 of the Revised Code of Ohio of the crimes of (1) "knowingly" having in his possession or under his control an "obscene" motion picture film and (2) of "knowingly" exhibiting an "obscene" motion picture film. The film involved in both charges was "The Lovers."

[fol. 1361] The appellant was sentenced to pay a fine of $500.00 on the first count of the indictment and was sentenced to pay a fine of $2,000.00 on the second count of the indictment and to stand committed to the workhouse of the City of Cleveland until such fine and costs were paid. Sentence has been stayed pending this appeal.

II. The Clerk of the above Court and to the extent that the following portions of the record have not been remitted to the above Court, the Clerk of the Court of Appeals of Cuyahoga County and the Clerk of the Supreme Court of the State of Ohio will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Defendant's Bill of Exceptions, including all of the State's and all of the Defendant's Exhibits;
2. Certified copy of Defendant's Motion to Quash, Demurrer and Motion for New Trial;
3. Certified copy of all docket and journal entries in The Court of Common Pleas of Cuyahoga County (Criminal Division);
4. Certified copy of all docket and journal entries in The Court of Appeals of Cuyahoga County, together with Defendant-Appellant's Motion to Certify to the Supreme Court of the State of Ohio;

5. Certified copy of Defendant-Appellant's Assignment of Errors and transcript of docket and journal entries in the Supreme Court of the State of Ohio; and

6. Certified copy of the opinions respectively of the Court of Common Pleas of Cuyahoga County (Criminal Division), Court of Appeals of Cuyahoga County, and The Supreme Court of the State of Ohio.

[fol. 1362] III. The following questions are presented by this appeal:

1. Whether Section 2905.34 of the Revised Code of the State of Ohio (which provides for punishment as a crime of the "knowing possession or control", and as a separate offense, of the exhibition, of obscene motion picture films) violates the due process clause of the Fourteenth Amendment to the Constitution of the United States because of the vagueness of the language of the statute and the vagueness of the statute as construed and because as construed and applied in this case the statute dispenses with the requirement of wrongful intent; and of actual knowledge on the part of the accused of the "objectionable" nature of the film, and permits more than one prosecution and punishment of a single offense.

2. Whether Section 2905.34 of the Revised Code of the State of Ohio (which on its face and as construed makes the "knowing possession or control" of an obscene moving picture, as well as the exhibition of such picture, a penal offense) inhibits the right of communication guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

3. Whether Appellant was deprived of the right of communication, and of equal protection of the laws, and of due process of law, in violation of the First [fol. 1363] and Fourteenth Amendments to the Constitution of the United States, the Appellant having been convicted of possessing and also of exhibiting a motion picture entitled "The Lovers", which film may not be deemed obscene for Constitutional purposes and

is within the protection of the First Amendment, and which film was judged obscene in this case in accordance with standards in conflict with those prescribed by the United States Supreme Court in Alberts v. California 354 U.S. 476 and in accordance with stricter standards than are applied to other publications.

4. Whether Appellant was deprived of the right of communication, and of civil and property rights and liberty without due process of law, by his conviction of violating Section 2905.34 of the Revised Code of Ohio, which statute as construed by the Supreme Court of the State of Ohio at the time of Appellant's conviction, and as applied by the Trial Court violated the right of free expression assured by the First and Fourteenth Amendments; and whether Appellant's rights were violated, without due process of law by the attempt to validate the statute by the change in its meaning, construction and standards after Appellant's conviction, the changes having been promulgated by the Supreme Court of the State of Ohio in its opinion in this case affirming Appellant's conviction.

[fol. 1364] 5. Whether Appellant was deprived of equal protection of the laws, and of due process of law, in violation of the First and Fourteenth Amendments to the Constitution of the United States in that he was prosecuted, convicted and punished for the commission of a felony under Section 2905.34 of the Revised Code of Ohio while the same acts committed under the same circumstances are punishable as a misdemeanor under Section 2905.342 of the Revised Code of Ohio.

Dated: April 10th, 1962.

Ephraim London, Attorney for Defendant-Appellant Nico Jacobellis, Address—1 East 44th Street, New York City, New York;

Of Counsel, Bennet Kleinman, Esq., 1040 Leader Building, Cleveland, Ohio.

To:

The Clerk of the Court of Common Pleas, Criminal Division, County of Cuyahoga, State of Ohio.

The Clerk of the Court of Appeals, Cuyahoga County, State of Ohio.

The Clerk of the Supreme Court, State of Ohio.

John T. Corrigan, Esq., the Prosecuting Attorney of Cuyahoga County, State of Ohio.

Proof of Service (omitted in printing).

[fol. 1365] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1366]

SUPREME COURT OF THE UNITED STATES

No. 164—October Term, 1962

NICO JACOBELLIS, Appellant,

vs.

OHIO.

Appeal from the Supreme Court of the State of Ohio.

ORDER NOTING PROBABLE JURISDICTION—October 8, 1962

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

Mr. Justice Goldberg took no part in the consideration or decision of this case.

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Supreme Court of the United States

OCTOBER TERM, 1961.

#11/1963

No. [redacted]

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

EPHRAIM LONDON,
Attorney for Appellant,
1 East 44th Street,
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Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

STATE OF OHIO,
Plaintiff-Appellee,

against

NICO JACOBELLIS,
Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

(a) Reports of the Opinions in the Courts Below.

The opinions of the Supreme Court of the State of Ohio in this case are reported in 173 Ohio St. 22, and 179 N. E. 2d 777, and are set forth in full in Appendix A. The opinion of the Court of Appeals for Cuyahoga County, State of Ohio, in this case is reported in 175 N. E. 2d 123. The opinion of the Court of Common Pleas for Cuyahoga County (Criminal Division), State of Ohio, is not reported. It is set forth in full in Appendix B.

(b) The Grounds On Which Jurisdiction Of The Supreme Court Of The United States Is Invoked.

(i) Appellant was convicted under Section 2905.34 of the Revised Code of Ohio of the crimes of (1) "knowingly" having in his possession or under his control an "obscene" motion picture film and (2) of "knowingly" exhibiting an

"obscene" motion picture film. The film involved in both charges was "The Lovers."

The appellant was sentenced to pay a fine of $500.00 on the first count of the indictment and was sentenced to pay a fine of $2,000.00 on the second count and to stand committed to the workhouse of the City of Cleveland until such fine and costs were paid. Sentence has been stayed pending this appeal.

(ii) The judgment sought to be reviewed is the judgment of the Supreme Court of the State of Ohio, entered January 17, 1962, which affirmed Appellant's conviction of possessing and exhibiting an obscene film bearing the title, "The Lovers". The judgment of the Supreme Court of the State of Ohio is set forth in Appendix C. The notice of appeal was filed April 12, 1962 in the Supreme Court of the State of Ohio, and in the Court of Appeals of Cuyahoga County, State of Ohio, and in the Court of Common Pleas, County of Cuyahoga, State of Ohio.

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257 (2)

(iv) Cases sustaining the jurisdiction of this Court are: *Mapp* v. *Ohio*, 367 U. S. 643; *Smith* v. *California*, 361 U. S. 147; *Alberts* v. *California*, 354 U. S. 476; *Burstyn* v. *Wilson*, 343 U. S. 495; *Lanzetta* v. *New Jersey*, 306 U. S 451.

(v) The validity of Section 2905.34 of the Revised Code of the State of Ohio is involved. The statute makes it a crime for any person "knowingly . . . (to) exhibit . . . or have in his possession or under his control an obscene . . . motion picture film." The text of Section 2905.34 is set forth in Appendix D.

(c) The Questions Presented by the Appeal.

(1) Whether Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material without regard to the nature and purposes of the possession.

(2) Whether Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reason for believing that the material is not obscene.

(3) Whether the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court, and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

(4) Whether Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment.

(5) Whether Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.

(6) Whether Section 2905.34 of the Ohio Revised Code on its face and as construed and applied in this case infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness

under the Due Process Clause of the Fourteenth Amendment in making it a felony knowingly to possess or exhibit an "obscene" motion picture.

(d) The Material Facts of the Case.

Appellant was indicted and convicted of possessing and exhibiting "The Lovers", an allegedly obscene motion picture film. The film was shown at the Heights Art Theater in Cleveland Heights, Ohio. Appellant was employed as manager of the theater by its owner. Appellant did not choose or "book" "The Lovers" or any other feature film for the Heights Art Theater.

"The Lovers" was produced in France. Although it was the subject of controversy, the film was acclaimed as a work of art by several motion picture critics and received one of the principal awards at the Venice Film Festival of 1959 and at a film festival in Brazil. The New York Times listed the film as one of the ten best of the year 1959. The story of the film is that of a woman who sacrificed husband, child, home, comfort, security and social position for an uncertain life with a young archaeologist with whom she had fallen completely in love.

Before the film was imported into the United States it was examined by the Customs authorities in New York and in Washington, D. C. The Bureau of Customs ruled that the film is "not obscene within the meaning of Section 305 of the Tariff Act." The film was shown in theaters in approximately 100 cities in the United States, including Louisville, Kansas City, Memphis, San Francisco, Los Angeles, New York, Washington, Boston, Detroit, Denver, Houston and Dallas, before it was sent to the appellant. The film was also shown in Columbus, Ohio and in Toledo, Ohio without interference. Later exhibitions in Dayton and Cleveland were stopped by police action.

The Judges of the Supreme Court of Ohio viewed the film and the majority opinion described it as "87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity." The majority of the Ohio Supreme Court also found that the picture "The Lovers" was *not* "hardcore pornography, i.e., filth for filth's sake. It was worse. It was filth for money's sake", and the court concluded that the "producers, distributors and exhibitors evidenced so little responsibility . . . that they have no right to assert constitutional guaranties . . ." 173 Ohio St. at p. 28 (App. A, p. 7a).*

How the federal questions were raised

The federal questions sought to be reviewed (other than Question 3) were raised on the argument of a demurrer to the indictment at the commencement of the trial in the Court of Common Pleas of Cuyahoga County (Criminal Division) (R. 20-35, 54).** The demurrer was overruled (R. 63). The pertinent language of the trial court's decision in favor of the validity of the challenged statute is as follows:

> "This trial court unanimously agrees that it is bound by the case of the State of Ohio *vs.* Dollree Mapp, 170 O. S. 427, and by the appeal decision therein, in which the constitutionality of Revised Code 2905.34 is upheld * * *." (R. 63)

Question 3 was raised when the issue was presented, at the conclusion of the trial, on argument to the trial court.

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* All references preceded by "App." are to the pages of the appendix to this Jurisdictional Statement.

** All references preceded by "R" are to the pages of the Bill of Exceptions included in the Record on Appeal from the Court of Common Pleas. The pagination referred to is in the upper right corner of each page.

Question 4 was also raised by means of a motion to quash the indictment, which was denied (R. 63).

The questions sought to be reviewed were argued on the appeal to the Court of Appeals of Cuyahoga County and by assignment of error on the appeal to the Supreme Court of Ohio. (Transcript of Record in the Supreme Court of Ohio, pp. 15-18.) The decisions in the appellate courts were also in favor of the validity of Section 2905.34. Questions 2 and 3 were decided in the majority opinion of the Supreme Court of Ohio; question 1 was also discussed in Judge Taft's concurring and dissenting opinion.

(e) The questions presented are substantial.

This appeal presents several constitutional questions, substantial in character. The validity of a state statute affecting the right of communication is drawn into question and, it is submitted, the Appellant's Federal Constitutional rights were violated by the enforcement of the statute. This Court in other cases recognized the substantiality of several of the questions raised here, but left them undetermined.

This appeal presents the question of whether a statute punishing the mere possession of obscene literature, violates the First and Fourteenth Amendments. That question, involving the same statute challenged on this appeal, was presented and considered by this Court in *Mapp* v. *Ohio,* 367 U. S. 643, but the question was not decided.

Another question presented by this appeal is whether this Court is bound by a revised construction of a state statute given by the highest court of the state *after* an accused was convicted. The construction given after the conviction was contrary to an earlier construction given by the same court, although the earlier construction had been adopted and followed by the trial court in which the

accused was convicted. Similar questions were presented in *Cole* v. *Arkansas*, 338 U. S. 345 and *Winters* v. *New York*, 333 U. S. 507. In *Cole* v. *Arkansas* the question presented was whether a state statute was unconstitutionally vague where the trial court in which a defendant was found guilty, and the appellate court, in which his conviction was sustained, were at odds in their interpretation of the statute. This Court found it unnecessary to decide that question, the case having been disposed of on other grounds (338 U. S. at 354). In *Winters* v. *New York*, 333 U. S. 507 one of the questions presented, and left unanswered, was whether a defendant was chargeable with knowledge of a later interpretation of a statute by the highest court of the state, made after the defendant's conviction. The question presented here embraces but is broader in import than those presented in the *Cole* and *Winters* cases, for in the case at bar the highest court of the state gave one interpretation of the statute shortly before Appellant's trial and an inconsistent interpretation on the appeal from Appellant's conviction.

Another question here presented was posed in the opinion of this Court in *Smith* v. *California*, 361 U. S. 147, at 154, namely the extent of the knowledge of obscenity on the part of an accused that a statute punishing the distribution of obscenity must require in order to meet Federal Constitutional demands.

This case also presents questions that arise as a result of this Court's opinion in *Roth* v. *United States*, 354 U. S. 476. In the *Roth* case the Court ruled that in judging whether a work is obscene "contemporary community standards" must be applied (354 U. S. at 489). One of the questions here presented is whether the term "community" was intended to include the people within the city or county in which the accused is prosecuted, or the people within a

state, or the people of the United States? Another question presented is whether this Court intended by its opinion in *Roth* (354 U. S. at 485), to free serious artistic endeavor and accomplishment from censorship.

Each of the questions here presented, those outlined in the preceding paragraphs and others referred to hereafter, relate to the fundamental right of expression, and each of the questions is of sufficient public importance to merit plenary consideration.

1. Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material, without regard to the nature and purposes of the possession.

The Appellant was charged with violation of Section 2905.34 of the Ohio Revised Code. That Section provides that "No person shall knowingly . . . exhibit . . . or have in his possession or under his control an obscene, lewd or lascivious . . . motion picture film". The Defendant was indicted and convicted on two separate counts, one count was for possessing the film "The Lovers" and the other count was for exhibiting it.

The trial of the charges against Appellant began May 23, 1960. Two months before that date the Ohio State Supreme Court construed Section 2905.34 of the Ohio Revised Code as making criminal the mere possession of obscene material *without* regard to the purpose of the possession, or the manner in which the material came into defendant's possession, or whether the accused had an opportunity to rid himself of the material. *State* v. *Mapp*, 170 Ohio St. 427. The majority of the Ohio Supreme Court in *State* v. *Mapp* were also of the opinion that Section 2905.34 as construed, infringed the constitutional right of free press because it might "discourage law abiding people from even

looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States", 170 Ohio St. at p. 432. Judge Herbert, in a separate opinion in *State* v. *Mapp* wrote: "I cannot agree that mere private possession of such literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." (170 Ohio St. at p. 437.)

The statute, Section 2905.34, was not adjudged invalid in *State* v. *Mapp*, 170 Ohio St. 427 because the Ohio Constitution requires a concurrence of six of the seven Judges of the Ohio Supreme Court in the finding of unconstitutionality before a statute may be judicially determined invalid, and a minority of three Judges of the court did not concur in that opinion of the majority. However, the construction of the statute in *State* v. *Mapp*, 170 Ohio St. 427 became the authoritative interpretation of the statute. It was controlling in the State of Ohio and was deemed binding on this Court (See dissenting opinion of Mr. Justice Harlan in *Mapp* v. *Ohio*, 367 U. S. 643 at 675).

An appeal from the judgment in *State* v. *Mapp*, 170 Ohio St. 427 was taken to this Court; and the "pivotal" issue on the appeal was the constitutionality of the provision of Section 2905.34 making "*mere* knowing possession and control of obscene material" a penal offense, *Mapp* v. *Ohio*, 367 U. S. 643 at 672 (dissenting opinion of Mr. Justice Harlan). This Court noted probable jurisdiction, 364 U. S. 868 but after argument reversed on other grounds, *Mapp* v. *Ohio*, 367 U. S. 643. The question under discussion was

thus left undetermined by this Court in *Mapp* v. *Ohio* but Mr. Justice Stewart in his concurring opinion in that case said: "I am persuaded that the provision of Section 2905.34 of the Ohio Revised Code upon which petitioner's conviction was based, is in the words of Mr. Justice Harlan, not consistent 'with the right of free thought and expression assured against State action' by the Fourteenth Amendment." 367 U. S. at 686.

After Appellant was convicted, the Ohio Supreme Court, on the appeal from Appellant's conviction, revised its interpretation of Section 2905.34 and ruled (in direct contradiction of its opinion in *State* v. *Mapp*, 170 Ohio St. at p. 432) that a wrongful purpose *is* an essential element of the crime defined by the statute and that wrongful possession of obscene matter is punishable only if such wrongful possession is with "a guilty or wrongful purpose" . . . "to use, exhibit or sell it wrongfully". 173 Ohio St. at p. 27 (App. A, pp. 6a-7a).

Judge Taft in his opinion in the court below in this case, noted that the statute was not capable of the changed construction for before 1939 the statute specifically provided for punishment of possession of obscene matter if the possession was for the purpose of sale, and the clause in the statute relating to the purpose of possession was stricken from the statute by the Ohio Legislature in 1939. Judge Taft also observed in his opinion in the court below that the changed interpretation of the statute "would be helpful" in avoiding a review by this Court. 173 Ohio St. at p. 30 (App. A, p. 10a).

Whether the new interpretation of Section 2905.34 is binding in the future, it cannot be given retroactive effect in this case. We believe this Court is for the purposes of this case, bound by the construction of the statute of the Supreme Court of Ohio in effect when the Appellant was tried. A statutory crime may not be re-defined by an

appellate court, after a defendant has been found guilty, in order to validate the conviction, *Lanzetta* v. *New Jersey*, 306 U. S. 451. The state of the law at the time of the commission of the alleged offense must be held to govern. In this case the indictment was framed under the construction enunciated in *State* v. *Mapp*, 170 Ohio St. 427 (without reference to any alleged wrongful purpose of possession), and the trial court stated that it was ruled by the opinion in that case.

It is the general rule that an interpretation of a statute by the highest court of a State shall be read into the statute as if so amended by the legislature, *Hebert* v. *Louisiana*, 272 U. S. 312, 317. But as a legislature's amendment of a criminal statute charging the ingredients of the crime may not be given retroactive effect (for that would be repugnant to Section 10 of Article I of the Constitution) such retroactive amendment may not be made by judicial fiat.

The attempted change by the Ohio Supreme Court in the elements of the crime of which Appellant was convicted would, if countenanced, deny Appellant due process of law. A penal statute must state precisely what conduct is prohibited so that a person may know in advance what actions are proscribed and what defense may be interposed. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453. A retroactive change in the definition of a statutory crime after one has been convicted of committing it, denies both the opportunity to avoid offending the law, and the opportunity to prepare the defense against the charge of violating it.

2. Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reasons for believing that the material is not obscene.

The question here presented is one that this Court posed but left undetermined in *Smith* v. *California*, 361 U. S. 147. The Court ruled in *Smith* v. *California*, that an ordinance making the offering of obscene material for sale a crime, is in conflict with the Constitution if it does not require the showing that the bookseller was aware of the nature of the material offered. See also *Lambert* v. *California*, 355 U. S. 225; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 237; *Wieman* v. *Updegraff*, 344 U. S. 183, 191. Such ordinance, the Court held, tends to restrict the sale and distribution of constitutionally protected expression by placing an almost insupportable burden on the bookseller.

The *Smith* case involved a statute that completely eliminated the requirement of *scienter* and imposed a strict criminal liability on the store owner possessed of an obscene book whether or not he was aware of its content. It was therefore unnecessary in that case to determine as Mr. Justice Brennan wrote for the Court " . . . what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U. S. at p. 154).

Section 2905.34 of the Ohio Revised Code as interpreted and applied in the instant case, required the conviction of one accused of holding and exhibiting a film thereafter found obscene by the court, although the accused had good reason to believe that the film did not offend the law. According to the undisputed evidence in this case there had been a determination by the United States Customs Bureau that the film "The Lovers" is "not obscene". Also, as Appellant knew, the film was shown publicly and was widely reviewed and was found acceptable in a number of cities in the United States before it was forwarded to Appellant. The challenged statute, as it was applied in this case, required Appellant to make an independent judgment contrary to that reached by a government agency, and contrary to that apparently reached in other parts of the United States.

Section 2905.34, thus interpreted and applied, though aimed at the repression of obscene material, also inhibits constitutionally protected expression. Under the statute, the owner or employee of a theater who is offered a film for exhibition, and who concludes that it is not obscene, may be guilty of a crime during the period he holds the film privately, and again when he exhibits it, though the conclusion that the film is not obscene is a reasonable one supported by and also reached by a department of the government required to make such determinations, and by a number of the local enforcement agencies in other states and cities. To avoid that risk, the theater owner or manager will tend to restrict the motion pictures shown at his theater to those that are "absolutely safe" and to which no objection may be taken. If Appellant's conviction in this case was authorized by Section 2905.34, the statute must be held to violate the First and Fourteenth Amendments because of its tendency to suppress constitutionally

protected expression. See *Smith* v. *California*, 361 U. S. 147.

3. The trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those outlined in *Alberts* v. *California*, 354 U. S. 476 and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

The court below after discussing differences in the proof of *scienter* required where the material dealt with is "hard-core pornography" and where the material in question has "theoretically" a serious artistic purpose, 173 Ohio St. at pp. 26-8 (App. A, pp. 5a-7a), acknowledged that the film involved in this case, "The Lovers", "is not hard-core pornography". 173 Ohio St. at p. 28 (App. A, p. 7a). The court below also found 87 minutes of the film vapid and boring, and 3 minutes of it completely revolting. 173 Ohio St. at p. 28 (App. A, p. 7a). The Ohio State Supreme Court also found that though the film was not "hard-core pornography" it was commercially exploited "filth", and that the exhibitor by showing it, evidenced so little responsibilitiy that he had "no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection". 173 Ohio St. at p. 28 (App. A, p. 7a).

We do not think it necessary to comment on the dictum that one must exercise a high degree of responsibility before invoking a constitutional right. It is clear also that the derivation or expectation of economic gain from a communication does not affect its right to the protection of the Constitution or the question of whether it is obscene. *Burstyn* v. *Wilson*, 343 U. S. 495, 501-502.

The prescribed standards for determining whether a work is obscene are set out in *Roth* v. *United States*, 354 U. S. 476. If a film is suppressed as obscene and it does not fall within the definition of that term outlined in *Roth*, the First Amendment right of communication is violated. *Smith* v. *California*, 361 U. S. 147, 152; *Burstyn* v. *Wilson*, 343 U. S. 495. This Court indicated in *Roth, supra* and in later cases, its intent to limit the material that may constitutionally be suppressed as obscene, to "hard-core pornography". See *Roth* v. *United States*, 354 U. S. 476, at 485; *One, Inc.* v. *Oleson*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 32-35; Lockhart and McClure, Obscenity Censorship: The Constitutional Issue—What is Obscene, 7 Utah L. Rev. 289, 295.

Since, as the court below conceded, the film "The Lovers" may not be considered "hard-core pornography" the appellant's convictions for possessing and showing it must be held a violation of his rights under the Fourteenth Amendment. We believe that a viewing of the film will convince this Court that the picture may not be considered obscene under any constitutionally permissible test.

We believe that the court below erred also in judging "The Lovers" by the effect of an isolated portion, contrary to the rule laid down in *Roth* v. *United States*, 354 U. S. at 489. See also *Grove Press, Inc.* v. *Christenberry*, 276 F. 2d 433, 437. If more than 96% of the film was deadly dull, as the Ohio Supreme Court indicated, then its "dominant effect" cannot be described as "having a tendency to excite lustful thoughts",—the test of obscenity enunciated in *Roth* v. *United States*, 354 U. S. at 486, 489.

Roth v. United States also requires a Court, in determining whether a work is obscene, to judge it in accordance with contemporary community standards (354 U. S. at 489). The term "community" is not defined in *Roth*, but it is clear that this Court did not intend the consideration of the singular standards of the people of a city, township or county. For the requirement of conformity to the different standards of each city and each rural area of a state would impose an undue burden on the distribution or dissemination of communications.

The trial court in this case did not indicate and the record does not disclose the geographical area or segment of the population the trial Judges had in mind when they declared that in evaluating the film they applied "community" standards (App. B, p. 12a). It is clear, however, that the trial court attempted to apply local standards that could not constitutionally, serve as a guide. The standards of the people of the State were not applied, for it will be recalled that the film was publicly shown in Toledo, Ohio and in Columbus, Ohio and there was no prosecution of, or interference with, the exhibition in those cities. It is also clear that the standards of the people of the United States were not applied, for the film was licensed for exhibition and shown in the State of New York and the Customs Bureau (presumably applying the standards of the nation) found the picture "not obscene".

The court below also failed to consider the artistic merit of the film. The excellence of the direction, acting and photography, have been generally acknowledged by those qualified to make such judgments. A work of such social value may not be banned as obscene, *Roth* v. *United States*, 354 U. S. at 484, 487. Kalven, Metaphysics of The Law of Obscenity, in The Supreme Court Review 11-13 (Univ. of Chicago Press, 1960).

4. Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment.

Appellant was charged with, and convicted of, and separately punished for two alleged offenses, one for possessing and the other for exhibiting an obscene film. As the crimes are defined in the statute, one cannot be guilty of feloniously exhibiting an obscene picture without being guilty also of felonious possession of the picture. The application of Section 2905.34 in this case resulted in Appellant's being convicted and punished twice for the same offense in violation of the due process clause of the Fourteenth Amendment, *Ex parte Lange*, 85 U. S. 163; *In re Nielson*, 131 U. S. 176. The multiplication of convictions and punishments for a single act of exhibiting a motion picture also tends to restrict the right of communication by increasing the risks to which distributors and exhibitors of films and their employees are exposed. The construction and application of the statute Section 2905.34 in this case is inconsistent with the guarantees of the Fourteenth Amendment. See *Smith* v. *California*, 361 U. S. 147.

5. Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.

Though Section 2905.34 on its face seemingly applies uniformly to all persons knowingly possessing or exhibiting "obscene" matter, a consideration of the related Sections 3767.01 (c) and 2905.37 of the Revised Code reveals that that is not so. As modified by the cited statutes, Section 2905.34 declares it a felony for any person knowingly to possess or to exhibit "obscene matter" unless the material

was "entered" as second class matter in the post office* or unless the material is a "work of art" distributed by a non-profit association of artists or for the advancement of art.** The constitutionality of Section 2905.34 must be measured as thus modified. *Jones* v. *Opelika*, 316 U. S. 584, 600, dissenting opinion, adopted by the Court on rehearing, 319 U. S. 103. So considered, Section 2905.34 is arbitrary and unreasonable in violation of the equal protection clause of the Fourteenth Amendment.

The issuance of a second-class mailing permit is not a guarantee that the holder will not thereafter enter obscene photographs or other obscene material. It is also difficult to understand why matter sent under first and third-class mail is not placed in the same category as material entered as second-class matter. And there is no assurance that any material considered a "work of art"*** by "an association of artists" or an "association for the advancement of art"*** will not be obscene or that it will have social value or artistic merit. See *Roth* v. *United States*, 354 U. S. at 485. The discrimination in favor of associations of self-styled artists and persons who receive obscene matter sent under second-class permit is completely unreasonable and bears no relation to the purpose of Section 2905.34. *City of Cincinnati* v. *King*, 11 Ohio Ops. 2d 433.

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* Section 3767.01 (c) (in effect at the time of Appellant's conviction); App. D, p. 16a.

** Section 2905.37; App. D, p. 15a.

*** The terms "work of art" and "association of artists" are such vague terms requiring subjective determination that arbitrary enforcement of the provise seems inevitable.

6. Section 2905.34 of the Ohio Revised Code on its face infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony knowingly to possess or exhibit an "obscene" motion picture.

The prevailing opinion in this Court, as expressed in *Roth* v. *United States, supra,* is that a criminal prohibition against "obscenity" does not violate the right of communication and that the word "obscene" as used in a criminal statute is not unconstitutionally vague. The record in this case furnishes occasion for reconsideration of those rulings. See *Smith* v. *California,* 361 U. S. 147, 155, 167 (concurring opinions of Mr. Justice Black and Mr. Justice Douglas).

June 6, 1962

Respectfully submitted,

EPHRAIM LONDON,
Attorney for Appellant.

BENNET KLEINMAN, ESQ.,
of Counsel.

On the Statement
EPHRAIM LONDON,
LOUIS LAUER,
JORDAN DERWIN.

APPENDIX A

Majority Opinion of The Supreme Court of Ohio and Concurring and Dissenting Opinion.

SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO,
Plaintiff-Appellee,

v.

NICO JACOBELLIS,
Defendant-Appellant.

(No. 37200—Decided January 17, 1962.)

CERTIFIED by the Court of Appeals for Cuyahoga County.

Defendant was indicted on two counts by the September 1959 Grand Jury of Cuyahoga County, Ohio, for violation of Section 2905.34, Revised Code. The first count in the indictment reads as follows:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

The second count in the indictment reads:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly exhibited a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral

in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof • • • and against the peace and dignity of the state of Ohio."

Section 2905.34, Revised Code, so far as it pertains to the defendant and his conduct on November 13, 1959, reads as follows:

"No person shall *knowingly* • • • exhibit • • • or have in his possession or under his control an obscene, lewd, or lascivious • • • motion picture film • • •.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

Upon arraignment the defendant entered pleas of not guilty to both counts of the indictment on November 30, 1959, and was released on bond.

On May 23, 1960, the defendant waived his right to trial by jury, both orally and in writing, and requested trial by a three-judge court. He was permitted to withdraw his pleas to make certain motions; thereafter the pleas of not guilty were re-entered and trial was had, resulting in a finding of guilty as charged in each count of the indictment.

The defendant was sentenced to pay a fine in the sum of $500 on the first count of the indictment and sentenced to pay a fine of $2,000 on the second count of the indictment and to stand committed to the workhouse of the city of Cleveland until such fine and costs were paid. Sentence was stayed pending appeal.

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is before this court pursuant to a certification of the record, the Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals of the Third Appellate District in the case of *State* v. *Wetzel*, decided December 10, 1960.

RADCLIFF, J. At the outset it is well to recall that an opinion of this court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case.

The defendant urges five assignments of error, the first two raising the constitutional issues involved. The third and fourth emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion. The final assignment of error raises the question of general prejudice.

There is an oft-quoted cliche to the effect that "it is not possible to legislate in the field of morals." The statement originally was and still should be, "it is not possible to legislate morality for the people." In support of this, there is always cited the classic example of the Eighteenth Amendment to the United States Constitution. We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to re-elect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure or mode of selection, con-

sequently its authority must be exercised with deliberate caution. *Lex citius tolerare vult privatum damnum quam publicum malum.*

We turn now to a consideration of the provisions of Section 2905.34, Revised Code, in relation to the various pronouncements of the Supreme Court of the United States in interpreting such statutes. The pertinent part of Section 2905.34, Revised Code, with which we are presently concerned, reads as follows:

"No person shall *knowingly* sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene * * * motion picture film * * *." (Emphasis added.)

At the outset it must be noted that the Supreme Court of the United States has held that obscenity is not protected by the constitutional provisions relating to freedom of speech. *Roth* v. *United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct., 1304.

In *Smith* v. *California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215, however, the Supreme Court struck down a state statute which imposed strict criminal liability for the mere possession for sale of an obscene book, without requiring any knowledge of the contents of the book. The case reserved, however, the question as to the extent of knowledge required which would validate such a statute.

Such infirmity does not exist in the statute under our consideration. It is specifically required under Section 2905.34, Revised Code, that the acts punished thereunder shall be done knowingly. The act requires knowledge. The question, of course, is knowledge of what. It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved.

Two questions must be determined at this time. First, the test as to what is obscene. The definition which has now become classic was laid down in *Roth* v. *United States*, *supra*, as follows, at page 489:

"* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene. There is no real or actual ambiguity in the phrase. No undue burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards, and as stated in *Roth* v. *United States, supra,* at pages 491 and 492:

"Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' *United States* v. *Petrillo,* 332 U. S., 1, 7-8 [91 L. Ed., 1877, 67 S. Ct., 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

The second question which arises is as to what extent a person is bound to have knowledge of the contents of that which he possesses. To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be presumed to know what they are dispensing. (*State* v. *Wetzel,* 173 Ohio St., 16.) It is in the more ethereal region of theoretical literary endeavor that the principal problem arises. Here, once again, the community must be the test. A commercial possessor obviously can not be held to the duty of examining and determining for himself the obscenity of all matters which pass

through his hands, neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under Section 2905.34, Revised Code.

Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section.

That there are marginal cases where such determination is difficult does not invalidate an otherwise valid enactment. *Roth* v. *United States*, *supra*, and *State* v. *Wetzel*, *supra*.

The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.

It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole.

In the phrase, "knowingly possess," as used in criminal statutes, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual dis-

covers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and acts in furtherance thereof.

When this phrase is read in context with and in relation to the rest of the section, it is readily apparent that such phrase does not relate to the mere possession for private and personal gratification but rather to possession and control for the purpose of circulation or exhibition, a matter clearly within the power of the state to control under the police power.

The third and fourth assignments of errors raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums. The facts were found by the three judges sitting as the triers of the facts who applied the standards prescribed in *United States* v. *Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. The producers, distributors and exhibitors evidenced so little responsibility in connection therewith that they have no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection. This is especially apropos of the First and Fourteenth Amendments to the Constitution of the United States.

There is a unique coincidence involving this case (*State* v. *Jacobellis*) and the case of *State* v. *Warth*, 173 Ohio St., 15, as the obscene material involved in both was Les Amants (The Lovers). However, the statute involved in each case is entirely different. Jacobellis was indicted, tried and convicted for violation of Section 2905.34, Revised Code.

Warth was indicted, tried and convicted for violation of Section 2905.342, Revised Code. The latter statute attempted to make *mere* possession or exhibiting an obscene motion picture film a misdemeanor. In view of the pronouncements of this court in *City of Cincinnati* v. *Marshall*, 172 Ohio St., 280, 175 N. E. (2d), 178, and of the Supreme Court of the United States in *Smith* v. *California, supra*, and our high regard for the doctrine of *stare decisis*, the conviction of Warth was reversed due to the constitutional infirmity of Section 2905.342, Revised Code, in omitting the element of scienter or knowledge. The cases in reality had no common principle of law involved, and, consequently, the different conclusion reached in each can not provoke any possible question of inconsistency. Had Warth been charged in Montgomery County with a violation of Section 2905.34, Revised Code, he would have been as guilty as we now find Jacobellis in Cuyahoga County.

As we find no error in the judgment of the Court of Appeals, such judgment is hereby affirmed.

Judgement affirmed.

ZIMMERMAN, acting C. J., MATTHIAS, BELL and O'NEILL, JJ., concur.

HERBERT, J., dissents.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

TAFT, J., concurring in part. I cannot be as positive in condemning the film involved in the instant case as the majority opinion is. However, in my opinion, reasonable minds could determine beyond a reasonable doubt that this film is, to use the words of the statute, "obscene, lewd, or lascivious."

I agree, therefore, with the judgment so far as it relates to the second count of the indictment charging defendant with exhibiting that film.

I also agree with the majority opinion that the word "knowingly" in the statute relates not merely to possession and control of the film but also to what is in the film.

However, I cannot agree with the judgment of this court, to the extent that it affirms the conviction of defendant on the first count charging defendant merely with knowingly possessing and having control of the film.

It is my opinion, as it was the opinion of Judges Bell, Peck, Herbert and myself in *State* v. *Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, that the portion of the statute upon which the first count is based is constitutionally invalid. As stated in the opinion in that case:

> "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime * * *. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded."

Likewise, under this statute, if anyone looks at a movie film that he has lawfully acquired to determine whether he should exhibit it and finds it to be obscene, he is forthwith and at that instant guilty of a serious crime. As a result, some who might otherwise look at movie films that are not obscene to determine whether they should exhibit those films may well be discouraged from doing so and free circulation and exhibition of movie films will be impeded.

If Section 2905.34, Revised Code, providing that "no person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film" were reasonably susceptible of interpretation as a prohibition of possession or control of such a film only where such possession or control was for the circulation or exhibition thereof, I could also concur in the judgment so far as it affirms the conviction on the first count. Apart from some consideration of the legislative history of this statute, this court *might* be justified in proclaiming that there was a legislative intent that the "possession * * * or control," in order to be a crime, must be, to use the words

of the majority opinion, "for the purpose of circulation or exhibition." But compare *State* v. *Warth*, 173 Ohio St., 15. As the majority opinion states, this matter is clearly within the power of the state to control under the police power.

It may be observed that it is probable that such a judicial proclamation of legislative intent would be helpful, if not conclusive, in avoiding a review by the United States Supreme Court of the constitutional validity of this portion of our statute.

However, the General Assembly has quite clearly indicated that it had no such intention. Thus, prior to 1939, the foregoing statute (then Section 13035, General Code) read so far as pertinent:

> "Whoever sells, lends, gives away [*i. e.*, circulates], exhibits * * * or has in his *possession for such purpose*, an obscene [etc.]." (Emphasis added.)

In that year, the General Assembly amended that statute by taking out the words "for such purpose" appearing after the word "possession," and added, after the latter word, the words "or has under his control." 118 Ohio Laws, 420.

The General Assembly thus quite clearly expressed a legislative intention not to modify the words "has in his possession or under his control" as the majority opinion and the decision in the instant case are modifying those words.

APPENDIX B.

Memorandum Opinion of Court of Common Pleas, Criminal Division.

Before William J. McDermott, P. J., Roy F. McMahon, J., and John Pincura, J., (Pincura, J., Court of Common Pleas (Lorain County) sitting by designation in Cuyahoga County).

Per Curiam

The defendant was indicted on two counts under the provisions of Section 2905.34 of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: "*Les Amants*" (or The Lovers), and (2) unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: "*Les Amants*" (or The Lovers.)

At the request of the defendant the cause was tried before a court of three judges under Section 2945.07 of the Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, filed in this cause and made a part of the record, all in accordance with the provisions of Section 2945.05 of the Revised Code.

In the motion picture "*Les Amants*" (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are por-

trayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth* v. *United States*, (June 24, 1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304. *"Les Amants"* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

Therefore, the Court finds the defendant guilty as charged in both counts of the indictment.

WILLIAM J. MCDERMOTT,
Presiding Judge.

ROY F. MCMAHON,
Associate Judge.

JOHN PINCURA,
Associate Judge.

APPENDIX C.

Order Appealed From.

SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO }
CITY OF COLUMBUS }

1962 Term
To Wit Wednesday,
January 17, 1962

THE STATE OF OHIO,
Plaintiff-Appellee,

v.

NICO JACOBELLIS,
Defendant-Appellant.

No. 37200
Certified by
the Court of
Appeals for
Cuyahoga County

This cause, certified by the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is Ordered that no penalty be assessed herein.

It is further Ordered that the Plaintiff-Appellee recover from the Defendant-Appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX D.

Statutes Involved.

Ohio Revised Code Section 2905.34. "*Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes:*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, of thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 8.)

Ohio Revised Code Section 2905.342. *"Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited:*

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"(B) Any motion picture film, the exhibition of which has created a public disorder, or from the exhibition of which a public disorder is imminent.

"The exhibition of a motion picture film which teaches or advocates that the violation of any of the criminal laws of the state of Ohio or any of the criminal laws of the United States of America is a proper or desirable course of conduct shall, prima facie, be deemed to create an imminent public disorder for the purpose of initiating the arrest of any person for the violation of this section.

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 9.)

Ohio Revised Code Section 2905.37. *"Legitimate publications not obscene:*

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sec-

tions 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-64.)

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions*:

"As used in all sections of the Revised Code relating to nuisances:

" 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37, 39, at p. 201.)

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 11

STATE OF OHIO,
Plaintiff-Appellee,
against
NICO JACOBELLIS,
Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO.

MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM ORDER APPEALED FROM.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,
Criminal Courts Bldg.,
Cleveland 14, Ohio,
Attorney for Appellee.

Of Counsel:
THOMAS L. OSBORNE,
Assistant Prosecuting Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

MOTION TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM ORDER APPEALED FROM.

Leave having been granted by this honorable Court, and, under the provisions of Rule 16, this Appellee moves that the appeal be dismissed, or, in the alternative, that the order appealed from be affirmed on the following grounds:

(a) The appeal is not with the jurisdiction of this honorable Court, because not taken in conformity to the rules of this Court.

(b) The appeal does not present substantial federal questions.

(c) Federal questions sought to be reviewed were not timely or properly raised, or expressly passed on.

(d) The judgment rests on an adequate non-federal basis.

The foregoing grounds are discussed, both as to fact and as to law, in the accompanying brief in support of the motion.

July 27, 1962

Respectfully submitted,

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BRIEF OF APPELLEE.

OUTLINE OF THE CASE.

The Appellant was manager of The Heights Art Theatre at Cleveland Heights, Ohio, since 1955. As such, he was supervisor of the entire physical operation, in charge of advertising, publicity, promotion, and the scheduling of films; and supervisor of personnel, maintenance, repairs, and screening.

With reference to "The Lovers," the motion picture in issue, he arranged for the appearance of advertisements in the November 11, 1959, issue of a local daily afternoon newspaper *The Cleveland News* and in the November 12th issue of the only local morning newspaper *The Cleveland Plain Dealer* containing the following: "When all conventions explode * * * in the most daring love story ever filmed." (See Appendix 14). In addition, he arranged for the insertion of an advertisement in *The Cleveland News* issue of November 12th that carried this language: "One of the most important films of the year. It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality." (See Appendix 15). The Appellant also arranged for the insertion of an advertisement in *The Cleveland Press* (the other local daily afternoon newspaper) issue of November 12th and in *The Cleveland News* issue of November 13th and in *The Cleveland Plain Dealer* issue November 13th with the words: "Something of a sexual revolution appears to be going on in the cinema and Malle (director of 'The Lovers') may well be one of the prophets." (See Appendices 16, 17, and 18).

The Appellant privately exhibited "The Lovers" in a screening room on November 10, 1959, to motion picture critics of *The Cleveland Plain Dealer*, *The Cleveland News*,

and of *The Cleveland Press*. He read the review of the film in *The Cleveland Press* on November 11th wherein the critic wrote that the photography was "wholly obscene so far as common decency is concerned."

During the daytime hours of November 12th, a detective captain of the local police department telephoned the Appellant, who affirmed that he intended to begin the public exhibition of the film that same evening, and that, having viewed the movie on two occasions, he could see nothing wrong with it. The motion picture was in fact publicly shown twice that evening to hundreds of persons, among whom at the first showing was the above-mentioned detective captain. He concluded that the film was obscene.

On the following day, the officer conferred with the local chief of police, the city law director, and the county prosecutor. Prior to the commencement of the public showings on November 13th, the Appellant read the review of the film in *The Cleveland Plain Dealer* entitled "Full Condemnation for 'The Lovers,'" wherein the critic described it as filth, referred to its shockingly nasty climax, mentioned its appeal to the prurient-minded, and called it "a dull picture until it turns to screened pornography, and then it becomes nauseous." (See Appendix 19).

During the second of two showings of the movie under the supervision of the Appellant during the evening of November 13th, at which approximately 350 persons were in attendance, the local police halted the exhibition, confiscated the film, and arrested the Appellant. In due course, he was indicted by the County Grand Jury on counts of knowingly possessing and controlling and exhibiting an obscene motion picture film on or about November 13, 1959, the Grand Jury having viewed the movie before returning the indictment.

The three-judge trial court, the three-judge district appellate court, and the seven-judge highest court of the state subsequently saw the picture.

Witnesses at the Appellant's trial testified that "The Lovers," taken as a whole, has sex as its domiant theme; it deals with that theme in such a manner as to arouse lustful thoughts and desires in the average person, taking into consideration the contemporary community standards; the whole picture is directed toward the sexual expression; in the bedroom scene, the leading female character was experiencing a sexual stimulation and gratification (an orgasm); it was shocking; the sex act performed was abnormal; and that the movie came out of the "New Wave" of French directors who are exploiting sex, violence, and perversion on the ground that such subjects are the only ones that are current money makers.

It was further testified that the entire purpose of the film was to lead up to one scene; the rest was merely *decor* to enable people to view it and not be altogether ashamed to view it; the dominant theme of sex was manifested in many instances, including the female lead's costuming, the action with the male lead in the boat scene, the disrobing of both man and woman, and the sequences in the bathtub and on the bed.

Before being permitted to be exhibited anywhere in the state of New York, the movie was "cut." It underwent deletions at the hands of the theater manager in Memphis, Tennessee. Only the censored version was permitted to be shown in Providence, Rhode Island, and in Boston, Massachusetts. Showings were stopped by the police in Portland, Oregon, and in Dayton, Ohio. The Dayton action led to criminal prosecution in which the theater manager was found guilty of exhibiting obscenity, but, on appeal, was discharged when the Supreme Court of Ohio found the

non-scienter misdemeanor statute involved in that case to be unconstitutional. *State v. Warth*, 173 Ohio St. 15, 179 N. E. 2d 772. (See Appendices 6 and 11.) The film was not permitted to be shown in Virginia or in Maryland, where requests for deletions in the movie had not been complied with by the owners.

The November 1959 issue of "Films in Review" catalogues the movie in "the class of pornography for 'cultivated' degenerates" and calls its script "an unbelievable contrivance to lead up to one scene in which the camera records at length the facial reactions of a woman during cunnilingus." (See Appendix 20).

The obscenity of the film is discussed in the Ohio court opinions at Appendices 2, 3, and 4, written by judges who saw the motion picture as part of the evidence. Similarly, Chief Judge Campbell of the United States (Northern) District Court of Illinois, Eastern Division, pointed out the obscenity of "The Lovers" in *Zenith International Film Corp. v. City of Chicago, Ill.*, 183 F. Supp. 623, at pages 635-6. (See Appendix 13.)

SOME PRELIMINARY CONSIDERATIONS.

The federal questions presented are not substantial. *Zucht v. King*, 260 U. S. 174, 67 L. ed. 194, 43 S. Ct. 24. The nature of the case and of the rulings of the court is not such as to bring the case within the jurisdictional provisions relied on and the cases cited to sustain jurisdiction. *Mapp v. Ohio*, 367 U. S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684; *Smith v. California*, 361 U. S. 147, 4 L. ed. 2d 205, 80 S. Ct. 215; *Alberts v. California*, 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304; *Burstyn v. Wilson*, 343 U. S. 495, 96 L. ed. 1098, 72 S. Ct. 777; and *Lanzetta v. New Jersey*, 306 U. S. 451, 83 L. ed. 888, 59 S. Ct. 618, 59 S. Ct. 647.

This honorable Court should decline jurisdiction. The questions presented do not require plenary consideration, with briefs on the merits and oral argument, for their resolution.

The judgment sought to be reviewed involves post-publication conviction for knowingly having obscenity in one's possession and under one's control and the knowingly exhibiting of such obscenity. Accordingly, the following cases can hardly be looked to as advocating the exercise of jurisdiction by this honorable Court: *Mapp v. Ohio, supra*, which was decided upon the grounds of an unconstitutional search and seizure, and which concerned the *mere* knowing possession or control of obscene material, while the instant case involves the knowing possession and control of obscenity *for the purpose of public exhibition; Smith v. California, supra*, predicated upon the possession of an obscene book *without knowledge of the contents* of such book; *Alberts v. California, supra*, wherein the primary constitutional question, *answered in the negative*, was whether the obscenity provisions of the California Penal Code invaded the freedoms of speech and press as they might be incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment; *Burstyn v. Wilson, supra*, anent *prior restraint* upon publication upon a claim of *sacrilege*; and *Lanzetta v. New Jersey, supra* which struck down a vague and uncertain state statute seeking to define and punish a "gangster." The term "obscene", on the other hand, has withstood attacks of vagueness and uncertainty. *Roth v. United States*, 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304.

In discussing his claim of the substantiality of the questions raised at pages 6-8 of his jurisdictional statement, the Appellant refers to *Mapp v. Ohio, supra*, which

was decided on grounds other than the validity of Section 2905.34 of the Ohio Revised Code (See Appendix 5) as it pertained to the *mere* possession of obscenity. When that case was considered by the Ohio Supreme Court, a majority of that court was of the opinion that the statute was unconstitutional as it applied to a defendant who, in packing up the belongings of a former roomer in such defendant's home, found lewd and lascivious books and pictures and packed them with such former roomer's other belongings *for the purpose of storing them for the roomer (owner of the books and pictures) until he came for them.* However, since a majority of less than six members of the Ohio Supreme Court was of the opinion that the portion of the statute upon which the conviction was based was unconstitutional and void, the judgment of the Ohio Court of Appeals sustaining the conviction had to be affirmed under a provision of the Ohio Constitution. *State v. Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387, 11 Ohio Ops 2d 169.

Judge Herbert of the Ohio Supreme Court, who believed that the obscenity statute had been unconstitutionally applied in the case of the convicted defendant, wrote *inter alia* in his dissenting opinion in the *Mapp* case:

> "* * * I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of their criminal use or a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home had been lost by her own conduct * * *."

Judge Bell concurred in this opinion. We may well infer that even the most ardent opponents of the "mere possession" interpretation of the statute hold to the opinion that

possession for "a commercial purpose," for "the purpose of distribution, commercial or otherwise" would be properly prohibited by the statute. Such inference is supported by the Ohio Supreme Court's opinion in the instant case, set forth at Appendix 2:

> "The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.
>
> "It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to be the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole."

It certainly was obvious to the trial court at the commencement of the trial, when the constitutionality of Section 2905.34 was raised on the argument of a demurrer to the indictment, that the count of possessing and controlling the motion picture film related to the same film claimed to have been exhibited. The bill of particulars, which had been submitted to the defendant at his request in advance of trial, and which became part of the court's file, made it clear that the purpose of the claimed possession was a commercial one. (See Appendix 21.) Therefore, the trial court properly applied the Ohio Supreme Court holding in

State v. Mapp, supra which upheld the ban on the possession of obscenity. There is no showing that the trial court did not have in mind that the possession alleged was associated with the exhibition alleged.

The trial court and the Ohio highest court were not at odds in their interpretation of Section 2905.34. As is pointed out in *Cole v. Arkansas*, 338 U. S. 345, 94 L. ed. 155, 70 S. Ct. 172, it is speculative that such a discrepancy, if it existed, would constitute a basis for concluding that an unconstitutional situation existed. In *Winters v. New York*, 333 U. S. 507, 92 L. ed. 840, 68 S. Ct. 665, the statute in issue was unconstitutionally vague both before and after the State Court of Appeals had restricted the statutes. No impropriety was found in the fact that the statute had been restricted.

There can be no doubt that the Appellant in the instant case was completely, totally, and specifically aware of the contents of the film prior to his public exhibition of it. On November 12th, during the daytime, he informed a police officer that he (the Appellant) had seen it twice. The evening, he gave two public exhibitions. On November 13th, he gave one full exhibition and part of another. In view of these facts, it would be useless to discuss the extent of the knowledge of obscenity on the part of an accused, as suggested by the Appellant at page 7 of his jurisdictional statement, wherein he cites *Smith v. California, supra.*

Less than serious is the statement at page 8 of Appellant's jurisdictional statement: "Another question presented is whether this Court intended by its opinion in *Roth* (354 U. S. 485) to free serious artistic endeavor and accomplishment from censorship."

At page 7 of his jurisdictional statement he suggests a question not raised in his notice of appeal as to the geo-

graphical area of the "community," the standards of which should be applied. *Roth v. United States, supra.* He was indicted by a County Grand Jury, tried by a three-judge county court, waived trial before a jury drawn from the county, and called as his witnesses persons from the county who testified as to the community standards of the county.

QUESTION 1.

In the case at bar, Section 2905.34 of the Ohio Revised Code does not violate the Federal Constitutional guarantees of freedom of communication. It does not punish the mere private possession of obscene material without regard to the nature and purposes of the possession.

As is pointed out elsewhere, the instant case is clearly distinguishable from *State v. Mapp, supra*, reversed on grounds other than obscenity in *Mapp v. Ohio, supra*. *Mapp* concerned the *mere* knowing possession or control of obscenity; the instant *Jacobellis* case involves the knowing possession or control of obscenity *for the purpose of public exhibition*. Even *State v. Mapp, supra*, did not foreclose the ban on possession for the purpose of exhibition, as will be seen from the opinion of Judge Taft (170 Ohio St. 427), *supra*, at pages 429, 431, and 432):

> "Defendant offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home; that, when she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them; that, in doing so, she found these lewd and lascivious books and pictures and packed them in a box and one of her suitcases with his other belongings *with the purpose of storing them*

until he came for his belongings; and that she never looked at these books and pictures again before they were seized by the police."

* * *

"The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. ed. 2d, 2211. That annotation does not indicate that there is any case decided in a court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited, as it was under Section 2905.34, Revised Code (formerly Section 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even *where the possessor does not have a purpose of again looking at the books or pictures*; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her *evidence that she had innocently acquired possession of these articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner* * * *

"If, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for her * * *" (Emphasis supplied.)

In *Alberts v. California, supra*, the constitutionality of a state statute and a conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them were sustained. *A fortiori*, the constitutionality

of an Ohio statute prohibiting the knowingly possessing and controlling and exhibiting of an obscene motion picture film and a conviction thereunder for knowingly possessing and controlling the obscenity *for the purpose of exhibition* and the actual exhibiting thereof are sustainable. The generic concept of *possession* includes within its ambit the species of possession *for the purpose of exhibition*. And that is the gist of the offense at bar. When the Ohio Legislature amended Section 13035, General Code (now Section 2905.34, Revised Code) in 1939, it assuredly did not intend to remove the prohibition against *possession for the purpose of exhibition*, a "purpose of distribution, commercial or otherwise," as was so aptly phrased by the dissenting Judge Herbert at page 438 of *State v. Mapp*, 170 Ohio St. 427, *supra*.

The prevailing and authoritative interpretation of Section 2905.34 with reference to the instant case is to be found in *State v. Jacobellis*, 173 Ohio St. 22, 179 N. E. 2d 777, and *State v. Wetzel*, 173 Ohio St. 16, 179 N. E. 2d 773. (See Appendices 2 and 12.) At the time that the trial court ruled upon the Appellant's demurrer, as mentioned at page 5 of his jurisdictional statement, the authoritative interpretation was *State v. Mapp, supra, which did not and does not militate against or contradict the interpretation in State v. Jacobellis*, 173 Ohio St. 22, *supra*, or *State v. Wetzel, supra*. Specifically in point with the facts of the case at bar are *Jacobellis* (173 Ohio St. 22) and *Wetzel* on the question of the possession of obscenity. *Mapp* was generally in point.

In *Mapp v. Ohio, supra*, there can be little doubt that neither Mr. Justice Stewart nor Mr. Justice Harlan was contemplating a case of *possession for the purpose of exhibition* when the former, at page 672, wrote with reference to the latter at page 686:

* * *

"I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

There was no attempt by the Ohio Supreme Court to re-define a statutory crime, after the defendant had been found guilty, in order to validate the conviction, as claimed by the Appellant at pages 10-11 of his jurisdictional statement, citing *Lanzetta v. New Jersey*, as his authority in point. In the first place, *State v. Mapp, supra*, did not exclude application of Section 2905.34 to a possession-for-exhibition case. And, secondly, *State v. Jacobellis*, 173 Ohio St. 22, *supra*, as well as *State v. Wetzel, supra*, validly applied the same Section to a possession-for-exhibition set of facts. Finally, *Lanzetta v. New Jersey, supra*, did not strike down a state statute *because* it had been defined by an appellate court, but because the statute was vague, indefinite, and uncertain *even after it had been so defined*. There can be no question of "retroactive effect" in the construction of the statute for, if at all, the statute, as interpreted by Ohio's highest court in the *Jacobellis* (173 Ohio St. 22) and *Wetzel* cases, is more restrictive than it was in *State v. Mapp, supra*. Since Section 2905.34, among its provisions, prohibits exhibition of an obscene motion picture film, the interpretation of the provision banning possession and control of an obscene motion picture film in such a way as to require that such possession or control be for the purpose of exhibition, for example, is not prejudicial to an accused. It requires the prosecution to prove purpose, and that beyond a reasonable doubt. Under *Herbert v. Louisiana*, 272 U. S. 312, 71 L. ed. 270,

47 S. Ct. 103, whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State. At pages 316-317, this honorable Court observed:

> "* * * The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation. * * * The Supreme Court of the State having held that the two statutes must be taken together in determining the penalty intended we must accept that conclusion as if written into the statutes themselves. * * * All that would be open in this Court under the due process clause is whether the State had power to impose the penalty fixed by the statutes as thus construed. * * * That the State had such power is not questioned, but only that the statutes rightly construed show that the power has been exercised. On this question, as we have said, the decision of the Supreme Court of the State is controlling."

The so-called "attempted change by the Ohio Supreme Court in the elements of the crime of which Appellant was convicted" (as claimed by the Appellant at page 11 of his jurisdictional statement) is no *change*, nor is it an *attempted change* in the elements prejudicial to the Appellant. After *State v. Mapp*, *supra*, and before *State v. Jacobellis*, 173 Ohio St. 22, *supra*, and *State v. Wetzel*, *supra*, he was less free than he was after the *Jaco-*

bellis, 173 Ohio St. 22, and *Wetzel* cases: his possession of obscenity *regardless of purpose* fell within the prohibitions of Section 2905.34. Now, purpose must be inquired into. The Appellant cannot successfully claim that the explication of *possession* and *control* in the *Jacobellis*, 173 Ohio St. 22, and *Wetzel* cases denied him either the opportunity to avoid offending the law or the opportunity to prepare his defense against the charge of violating it.

The Appellant's possession and control of the motion picture film was not a "mere private possession," but a possession and control highly-publicized by the Appellant himself. *State v. Mapp, supra.*

To make effective the prohibitions against the selling, lending, giving away, exhibiting, or publishing of obscenity, as provided for in Section 2905.34, the possession and control of obscenity for such purposes should be proscribed. Among the ultimate objectives of bringing obscene material into being are the selling, lending, giving away, exhibiting, and publishing. Since the possession and control of obscenity in the instant case were for the purpose of exhibition, the question as to whether or not the application of Section 2905.34 was a valid exercise of the police power should be determined in the light of the facts of the case, not on the basis on a non-existent "mere" possession. The statement of Professor Paul A. Fruend, quoted in another connection in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 1 L. ed. 2d 469, 77 S. Ct. 1325, is appropriate here: "What is needed is a pragmatic assessment of its operation in the particular circumstances."

Here, the defendant procured the film for exhibition. He held a private showing for the benefit of local newspaper motion picture critics. He inserted highly-suggestive advance advertisements in the daily newspapers. The police department, having been put on notice by such adver-

tisements, conferred with him about the propriety of the exhibition of the film. The defendant thereafter exhibited the film publicly twice that evening. The advertisements continued. The motion picture was being exhibited the following evening (for the second time that evening) when the defendant was arrested and the showing was stopped.

This case is clearly distinguishable from *State v. Mapp, supra.* The privacy of the defendant's home and of his own library is not an issue. He was not a mere custodian of the obscene material. The seizure was not unreasonable. Well in advance of his arrest the defendant had knowledge of the contents of the film, yet he persisted in the possession, arranged for advertisements, and proceeded to exhibit. No proximate or remote effect upon free speech or free press is involved.

In *Smith v. California, supra,* we may logically infer that, if the element of *scienter* had been required, the ordinance of the City of Los Angeles would have been upheld. It is interesting to note that, *inter alia,* that same ordinance made unlawful the possession of an obscene motion picture film *in any place where motion pictures are exhibited*—a regulation which aptly applies to the fact situation in the instant case.

QUESTION 2.

Section 2905.34 of the Ohio Revised Code, as interpreted and applied in this case, is not violative of the Federal Constitutional guarantees of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene.

In *Rosen v. United States,* 161 U. S. 29, 40 L. ed. 606, 16 S. Ct. 434, it was well decided that an accused's alleged lack of knowledge of the fact of obscenity and his alleged

belief in the non-obscenity of the material in issue is unavailing, if the material was in fact obscene and the accused knew or had notice of the contents of the material. At page 41, the Court wrote, *inter alia*

* * *

> "* * * Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute has been violated. * * *"

See also *Price v. United States*, 165 U. S. 311, 41 L. ed. 727, 17 S. Ct. 366, and *Roth v. United States*, *supra*, at page 491; 33 *Am. Jur.* 18, Sec. 6; Ann. Cas. 1912A 434; 67 *C. J. S.* 32, Sec. 7e; and *Notes on U. S. Reports* contained at pages 470-71, 40 L. ed.

The test for obscenity is not a subjective one wherein the accused decides the criminality or non-criminality of his own act.

The Appellant had good reason to know that the material was obscene. He did not have cogent reasons for believing that it was not obscene. He advertised it in the local daily papers in such terms as "conventions explode," "the most daring love story ever filmed," "very pure in its worship of sex itself as the incarnation of love," "unabashed, truthful sensuality," and characteristics of a "sexual revolution." (See Appendices 14, 15, 16, 17, and 18).

The instant case of a motion picture theater manager, specifically aware of the contents of the film, advertising in advance and then giving public exhibitions of "The

Lovers" is not to be identified with the proprietor of a bookstore concerned in *Smith v. California, supra.* At page 154, the Court's opinion contains the following language:

* * *

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; *whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be.*" * * * (Emphasis supplied).

In the case at bar, we are dealing with one who is fully aware of the contents of the material in question, not a person surrounded by an immensity of ever-new publications constantly flowing through his place of business, any of which might be obscene. The latter could be honestly mistaken as to whether or not the contents of any specific book were obscene, having little or no knowledge of the contents themselves.

Distinguishable is *Lambert v. California*, 355 U. S. 225, 2 L. ed. 2d 228, 78 S. Ct. 240, which concerned a city ordinance making it an offense for a person convicted of a crime punishable in the state as a felony to remain in the city for more than five days without registering with the Chief of Police. As applied to a person who had no actual knowledge of his duty to register, and *where there was no showing made of the probability of such knowledge*, the ordinance was held to be invalid. Likewise distinguishable is *Sweezy v. New Hampshire*, 354 U. S. 234, 1 L. ed. 2d 1311, 77 S. Ct. 1203, involving a conviction of contempt of court of a person who refused to answer questions relat-

ing to the contents of a lecture he had delivered and his knowledge of the Progressive Party of the State and its members. Again, distinguishable is *Wieman v. Updegraff*, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215, relating to a state statute requiring each state officer and employee, as a condition of his employment, to take a "loyalty oath." As applied to persons excluded from state employment solely on the basis of membership in a "communist front" or "subversive" organization, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged, the statute was held to violate the Due Process Clause of the Fourteenth Amendment.

The administrative ruling of the Bureau of Customs that the film was "not obscene within the meaning of Section 305 of the Tariff Act" (mentioned at page 4 of Appellant's jurisdictional statement) was and is not binding upon Ohio. The people of a state, in the case of a foreign film such as the one in issue, are not compelled to rely solely upon the customs officials for their judgment. Such customs officials, in admitting a film, do not prevent the people of a state from arriving at a different judgment. *Eureka Productions, Inc., v. Lehman,* 17 F. Supp. 259, 309 U. S. 634, 82 L. ed. 494, 58 S. Ct. 944; *Arrow Distilleries v. Alexander*, 306 U. S. 615, 83 L. ed. 1023, 59 S. Ct. 489. The federal statute regulating the admission of films into the United States has as its purpose the supplementing of state legislation, leaving the matter of local control for determination by the states. *Eureka Productions, Inc., v. Lehman, supra.*

The claim that the Appellant knew that the film was shown publicly and was widely reviewed and was found acceptable in a number of cities in the United States before it was forwarded to Appellant is sheer extravagance

and not borne out by the facts. Since the Customs determination was not binding upon Ohio, the Appellant was not required "to make an independent judgment contrary to that reached by a government agency." (See page 13 of Appellant's jurisdictional statement). The claim that he was required to make an independent judgment contrary to "that apparently reached in other parts of the United States" is absolutely disingenuous.

The prosecution for the possession of obscenity for the purpose of exhibition, and the prosecution for the actual exhibition thereof, do not violate the First and Fourteenth Amendments. There is no tendency to suppress constitutionally protected expression. *Smith v. California, supra.*

QUESTION 3.

Despite the provisions of paragraph 1 (b) (ii) of Rule 13 of this honorable Court, the jurisdictional statement omits mention of the following pertinent facts:

1. Section 1 of Rule XX of the Rules of Practice of the Ohio Supreme Court authorizes the making of an application for rehearing of any cause within fourteen days after the announcement of a decision. (See Appendix 9).

2. On January 22, 1962, the Ohio Supreme Court was informed in writing by the then-attorney for the Appellant that he, the attorney, intended to apply for a rehearing of the decision of January 17, 1962, now sought to be reviewed, and, further, that the application for rehearing, together with supporting brief, would be submitted to that Ohio Court on or before January 31, 1962.

3. On January 30, 1962, the same attorney for the Appellant informed the Ohio Supreme Court in writing that he was thereby withdrawing his intention to apply for such a rehearing.

In light of the foregoing, it is apparent that the Ohio Supreme Court was given no opportunity to pass judgment upon Question 3, a ground on which the jurisdiction of this honorable Court is invoked.

Jurisdiction of this honorable Court is sought to be invoked by means of appeal under the provisions of Title 28 of the United States Code, Section 1257 (2), relative to a final judgment by the highest court of Ohio wherein was drawn into question the validity of an Ohio statute on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

At no time was there raised in either (1) the trial court, (2) the intermediate appellate court, or (3) the highest Ohio court, the claim that:

* * *

> "* * * the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court * * *" (See paragraph (c) (3) at page 3 of Appellant's jurisdictional statement).

In specific negation of the allegation at pages 5-6 of Appellant's jurisdictional statement, Question 3 was not raised at the conclusion of the trial, on argument to the trial court, nor was it argued on appeal to the Court of Appeals of Cuyahoga County, or by assignment of error on the appeal to the Ohio Supreme Court.

Nevertheless, as will be seen from a perusal of the unanimous memorandum opinion of the three-judge trial court (Appendix 4), the unanimous affirming opinion of the three-judge County Court of Appeals (Appendix 3) (*State v. Jacobellis*, 175 N. E. 2d 123), and the opinion of six of the seven judges of the Ohio Supreme Court (Appendix 2), each of these state courts judged the film on

the basis of those standards previously enunciated by this honorable Court, especially reflected in *Roth v. United States, supra,* together with *Alberts v. California, supra.* The dissenting jurist in the highest Ohio court in *State v. Jacobellis,* 173 Ohio St. 22, 179 N. E. 2d 777, wrote no opinion. He was in poor health at the time of oral argument before the Ohio Supreme Court and also when that court rendered its judgment of affirmance.

Nothing in the judgment or in the opinions of this honorable Court relative to *Manual Enterprises, Inc. v. Day,* ___U. S. ___, ___ L. ed. 2d ___, 82 S. Ct. 1432, militate against the obscenity of "The Lovers," a motion picture which is so offensive on its face as to affront current community standards of decency.

The trial court, in convicting the Appellant, judged the film in accordance with the standards set forth in *Alberts v. California, supra,* as will be see in Appendix 4:

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* * * *. *'Les Amants'* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. * * *"

As pointed out elsewhere, *Roth* and *Alberts* were decided together.

The district court of appeals utilized the same standards, as appears in Appendix 3:

> "The trial court, in finding the defendant guilty as charged, was governed by the standards defined

and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving picture film, 'Les Amants' we agree with and adopt the same as part of our opinion in this case * * *"

(At this point, the higher court set forth *verbatim* the contents of Appendix 4 almost in its entirety.)

The highest Ohio court, too, with six of its seven judges concurring as to the obscenity of the film, also wrote *inter alia:*

"The definition which has now become classic was laid down in *Roth v. United States, supra,* as follows, at page 489 * * *

"Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene. * * *

* * *

"* * * The facts were found by three judges sitting as triers of the facts who applied the standards prescribed in *United States v. Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

"This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. * * *"

Further evidence that the Ohio courts judged the film obscene in accordance with standards *in conformity* with those prescribed by this honorable Court is the fact that

the Appellant, in his brief filed in the Ohio Supreme Court, criticized *Roth v. United States, supra,* found fault with its definition of "obscenity" and the standards by which it should be judged, cited its rejection by some state courts, and claimed that *Roth* is not binding upon the Constitution of the State of Ohio. *The Appellant requested the Ohio Supreme Court to reject the test* announced in *Roth* for the reason that it was *unconstitutionally vague, impractical, and unworkable!* (See Appendix 10.)

Judge Radcliff, in writing the opinion of the Ohio Supreme Court in *State v. Jacobellis,* 173 Ohio St. 22, *supra,* (Appendix 2) set forth his personal position in the case:

> "At the outset it is well to recall that an opinion of this Court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case." * * *

Now, the only fair and reasonable interpretation of Judge Radcliff's language that "The Lovers" was not hard-core pornography (filth for filth's sake), that it was worse because it was filth for money's sake, is this: the film was hard-core pornography *and more.* The film, suppressed as obscene, fell squarely within the definition of that term outlined in *Roth* and as recently outlined in *Manual Enterprises, supra.* In this connection, the cases of *Burstyn v. Wilson, supra,* and *Smith v. California, supra,* are not violated.

No valid parallel may be drawn between the instant case and *One, Inc., v. Olesen,* 241 F. 2d 772, 355 U. S. 371,

2 L. ed. 2d 352, 78 S. Ct. 364; *Times Film Corp. v. City of Chicago*, 244 F. 2d 432; 355 U. S. 35, 2 L. ed. 72, 78 S. Ct. 115; and *Sunshine Book Co. v. Summerfield*, 128 F. Supp. 564; 249 F. 2d 114; 355 U. S. 372, 2 L. ed. 352, 78 S. Ct. 365. It is apparent from reading the opinion in *One*, as enunciated by the appellate court, that the now prevailing standard for judging obscenity was not followed. Firstly, the legal consideration of the fact situation at that time antedated by some months the *Roth* decision, and failed to anticipate its rationale. Secondly, it appears affirmatively that the said lower court did not have in mind the dominant theme of the material taken as a whole, its appeal or prurient interest to the average person, and the contemporary community standards. Hence, this honorable Court, when it considered *One* several months after the *Roth* case; was called upon to reverse.

The above analysis with reference to *One* applies with equal vigor to the *Times* case.

Although the *Sunshine* decision in the appellate court postdated by some months the *Roth* case, the then and now prevailing standard for judging obscenity was not applied by the appellate court. That court did not apply it in its own appraisal of the allegedly obscene material. And it also erred in finding that the lower district court had followed the spirit of the *Roth* decision. Once again, this honorable Court was obligated to reverse.

As both the intermediate appellate court and the trial court in the instant case set forth at Appendices 3 (175 N. E. 2d 123) and 4:

* * *

> "In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the state has been set and the characters have assumed their relation-

ships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. *After the narrative has reached this carefully built-up and long-anticipated climax, it scurries to a hasty conclusion.*

"*In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.*" (Emphasis supplied.)

* * *

In view of Judge Radcliffe's opinion setting forth that "Les Amants (The Lovers) was not hard-core pornography, *i.e.*, filth for filth's sake," that "(i)t was worse," and that "(i)t was filth for money's sake," it can be seen that there is no basic conflict between the above-quoted language of the intermediate appellate and trial courts and that of the Ohio Supreme Court, speaking through Judge Radcliff. The motion picture was not judged by the effect of an isolated portion. It was considered as a whole. No analogy may be drawn between "The Lovers" in the instant case and "Lady Chatterley's Lover," as considered in *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433.

As pointed out elsewhere, the Appellant, at his trial, presented evidence as to the community standards of Cuyahoga County in order to support his claim that the motion picture was not obscene under the *Roth* test. Now, he

complains that the trial court judged the movie by those standards. *Webster's New International Dictionary*, second edition, unabridged, defines the term *community* as:

> "1. A body of people having common organization or interests, or living in the same place under the same laws and regulations. * * *
>
> "2. Society at large; a commonwealth or state; a body politic; the public, or people in general;— used with the definite article; as, the interests of the *community*; restrictedly, the people of a particular place or region, as a town, village, or neighborhood; hence, the region itself; as, the proposed system will benefit our *community*. * * *" (Emphasis supplied.)

The court below did not fail to consider the so-called "artistic merit of the film." The court viewed the film itself. And it had before it the testimony of a film critic with forty-one years experience as a writer for the *Cleveland Plain Dealer*; a former television program chairman, currently an editorial writer and Cleveland radio broadcaster; and the editor of "Films in Review," published in New York, a monthly magazine devoted to every serious aspect of motion pictures, published by a national review board, which editor had reviewed 200 or 300 movies a year for the previous ten years. The Appellant's "experts," on the other hand, were unable to rebut the evidence that the movie was a piece of obscenity, not a work of art. The claim at page 16 of Appellant's jurisdictional statement that "(t)he excellence of the direction, acting and photography, have been generally acknowledged by those qualified to make such judgments" is without proof and is contrary to fact.

QUESTION 4.

Appellant was not convicted and punished twice under Section 2905.34 for the same offense.

It should be pointed out that the first count of the indictment charged that the Appellant:

> "* * * *on or about* the 13th day of November, 1959, at the County aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious Motion Picture Film, to-wit: (Les Amants) 'The Lovers' * * *"

The Appellant exhibited the film twice in the evening of November 12, 1959, and during the second showing in the evening of November 13th, was halted by the police. He had been in possession of the film for the purpose of exhibition from and during the daytime hours of November 10th until during the evening hours of November 13th. Only a small fraction of that entire period was devoted to the actual exhibition. Accordingly, the trial court, in passing upon the charge of possessing and controlling obscenity, did not necessarily find that (1) the exhibition of obscenity, for which the Appellant was convicted, was simultaneous with (2) the possession and control of obscenity, for which the Appellant was convicted.

During the many hours of the period November 10th-13th, possession and control (rather than exhibition) characterized the overwhelming majority of the time. Again, with specific reference to the date of November 13th, there were many hours of possession and control distinct from those hours during which the film was exhibited.

Likewise, the Appellant possessed and controlled the film on November 10th and 11th, on which specific dates he did not exhibit the movie. Certainly, those periods of

possession and control were not the same offenses as the exhibitions of November 12th and 13th.

One can be guilty of felonious possession of a film for the purpose of exhibition without actually exhibiting it.

Section 2905.34 provides a maximum punishment of a money fine *and also* imprisonment for each act of possession of obscenity and each act of exhibition of obscene material. On conviction of the *possession* charge, the Appellant was fined only. The same was true of the penalty imposed with reference to his conviction for exhibition. In neither case was he sentenced to imprisonment. So, on neither count nor on both counts did he receive the maximum penalty of both a money fine and imprisonment. Inappropriately cited by the Appellant is *Ex parte Lange*, 85 U. S. 163, 21 L. ed. 872, relating to a case in which a court imposed fine *and* imprisonment, where the statute only conferred power to punish by fine *or* imprisonment. Nor in point is *In re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 S. Ct. 672, involving the conviction of the crime of unlawful cohabitation as being a bar to a subsequent prosecution for the crime of adultery.

QUESTION 5.

Under the provisions of paragraph 2(c) of Rule 10 this honorable Court may not consider Question 5. It was not raised in the notice of appeal, contrary to the provisions of paragraph 1 (e) (2) of Rule 15. While a seemingly similar issue was raised in the notice of appeal, Question 5 is in addition thereto, is different in substance, and is not fairly comprised therein.

Despite the foregoing, and out of an abundance of caution, there follows a discussion of Question 5 to show that Section 2905.34, in light of related statutes, does not

deny equal protection of the laws, nor does it authorize punishment without due process of law.

No proper analogy may be drawn between the instant case and *Jones v. Opelika*, 319 U. S. 103, 87 L. ed. 1290, 63 S. Ct. 890, which involved a city ordinance requiring that license be procured and that taxes be paid by missionary-peddlers of religious books or tracts as a condition precedent to the pursuit of their activities. Such legislation was held to be a denial of freedom of speech, press and religion under the Federal Constitution.

The Appellant's citing of *City of Cincinnati v. King*, 11 Ohio Ops. 2d 433, 84 Ohio Abstract 84, 168 N. E. 2d 633, is apparently intended to draw attention to a finding of a municipal trial court judge to the effect that the state statute Section 2905.34 was unconstitutional, thus sustaining the local ordinance against the charge that it made a misdemeanor of the same acts proscribed by the state felony statute. Suffice it to say that no higher court has looked to this opinion as a valid precedent.

A reasonable interpretation of Ohio Revised Code Sections 2905.37 and 3767.01 (c), set forth at Appendices 7 and 8, reveals that Ohio Revised Code Section 2905.34, set forth at Appendix 5, of which the Appellant was convicted of violating, applies uniformly to all persons knowingly possessing, controlling, or exhibiting obscenity.

The provisions of Section 2905.37 relative to a "work of art" were a safeguard in arriving at a proper understanding, prior to *Roth v. United States, supra*, of what was meant by the expression "obscene, lewd, or lascivious * * * motion picture film * * *" prohibited by Section 2905.34. No association of artists or for the advancement of art is given license to exhibit or possess or have under its control an obscene motion picture film. No such association is exempted from the operation of Section

2905.34. An obscene motion picture film is not a "bona fide" work of art.

Section 2905.34 of the Revised Code was last amended by the General Assembly in 1955, almost two years prior to the enunciation of the standards for judging obscenity appearing in *Roth v. United States, supra.* Confusion had reigned over a long period of time as to what constituted obscenity and wherein it could be distinguished from a true work of art. Oftentimes, works of art portraying nudity and sex were erroneously identified with obscenity. *Roth* solved the then-existing problem by its definition and description of obscenity and its setting of the standards by which obscenity might be judged. However, before *Roth*, the Ohio General Assembly felt called upon to make some necessary differentiation between obscenity and works of art. Section 13037 of the General Code (predecessor to Section 2905.37 of the Revised Code) was amended accordingly in 1943; it was specifically spelled out that obscenity was not included in "Bona fide works of art."

Section 2905.37 of the Revised Code makes reference to a "bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44 inclusive, of the Revised Code * * *." It follows, therefore, from the provisions of that series of statutes just mentioned, that such bona fide association is one whose proven aims are in conformity with a well-ordered society wherein the following crimes (and conduct leading to such crimes) are suppressed: Obscene language, nudism, obscene literature, obscene motion picture films, obscene matter, immoral literature, immoral pictures, immoral exhibitions, lewd pictures, bigamy, sodomy, adultery, fornication, incest, seduction, prostitution, pandering, procuring, white

slavery, and indecent exposure. In addition, such "bona fide association", must not have sympathy with sexual items or matters which are illicit, lewd, obscene, indecent, immoral, disorderly, indiscriminate, unchaste, licentious, filthy, impure, lustful, corrupt, profane, and improper.

In view of the foregoing, how can it be truthfully said that an association of artists or an association for the advancement of art is exempt from the penalties of Revised Code Section 2905.34? How does it appear that the legislature approves traffic in obscenity by artists?

It might be noted in passing that Section 2905.37 of the Revised Code bears out the proposition that works of art are legitimate, and that legitimate works of art are not obscene.

The statute provides that "Sections 2905.33 to 2905.36, inclusive, of the Revised Code *do not affect* * * * the publication and distribution of bona fide works of art *.* *." The terms of the statute are well chosen: An obscene motion picture film, not being a work of art, does not affect the publication and distribution of bona fide works of art.

A workable and adequate standard has been established by a statute within definite valid limits and with limitations for guidance. A policy has been laid down. No lack of uniformity or discrimination results. 11 *Am. Jur.* 955-56, Sec. 240. Section 2905.37 of the Revised Code provides that the works of art be bona fide; that they be made, published, and distributed by a bona fide association of artists or an association for the advancement of art; that such association be a non-profit organization; and that the demonstrated purpose of such organization does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, *suppressing the evils (and the means tending to result in such evils) enumerated in the fourth paragraph*

above, and inimical to the type of sexual items and matters set forth in the same paragraph.

Even had the movie "The Lovers" been made, published and distributed by an art association, the subsequent exhibition of the film by the Appellant would still be criminal because of the movie's obscenity. A *bona fide* work of art is not an obscene motion picture film. Nor is an obscene motion picture film a *bona fide* work of art.

The provisions of section 3767.01 relative to publications entered as second class matter by the post-office department are not discriminatory or unreasonable. They bear direct relation to the purpose of Section 2905.34.

Mailable matter is divided into four classes. Second class matter consists of all newspapers and other periodical publications. Further requirements for admission to second class are that such newspapers and other periodical publications must be issued at stated intervals, as frequently as four times a year; they must bear a date of issue and be numbered consecutively; they must be formed of printed sheets; and they must have a legitimate list of subscribers (39 U. S. C. Secs. 221, 224, 226). Accordingly, the provisions of Section 3767.01 of the Revised Code pertaining to "any newspaper, magazine, or other publication entered as second class matter by the post-office department" do not apply to the motion picture film "The Lovers." Neither the Appellant in the instant case nor any other motion picture possessor, controller, or exhibitor is affected in any respect. Where is the claimed power of the Post Office Department to exempt any possessor, controller, or exhibitor of an obscene movie from Ohio the penalties of Section 2905.34 of the Revised Code?

Irrespective of the fact that a motion picture film may not be admitted to the second class, the "post-office de-

partment" provision of Section 3767.01 of the Revised Code is a reasonable and constitutional narrowing of the application of Section 2905.34 of the Revised Code.

> "The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection clause of the Fourteenth Amendment. This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. * * *
>
> "The existence of the power of classification to suppress an evil is not to be denied simply because some innocent articles or transactions may be found within the prescribed class." (12 *Am. Jur.* 162-3, Sec. 484.)

It can validly be opined that the General Assembly of Ohio, in amending Section 6212-1 of the General Code (antecedent to Section 3767.01 of the Revised Code) in the year 1943 felt that there was a sufficient control of obscenity on a federal level as far as second class mail was concerned and that Ohio had little or no problem in that area. If such feeling on the part of the Legislature existed, then the separate classification of such publications is reasonable and valid. Obscenity is not mailable in *any* class. Its mailing is subject to a heavy fine and lengthy imprisonment (18 U. S. C. Sec. 1461). And the second-class mail privileges may be suspended or annulled after a publication has been accorded them (39 U. S. C. Sec. 232). The grant of second class mail privileges to a newspaper or other periodical publication is no guarantee that issues of that newspaper or publication subsequent to the grant are not obscene. Hence the Federal provisions relative to the criminal prosecution of obscenity and the suspending or annulling of the grant.

A State may withhold provision for the punishment of a person subject to the Federal Obscenity Laws. The Ohio constitutional provision as to uniformity of operation does not preclude reasonable classification (*State ex rel. v. Thrasher*, 130 Ohio St. 434, 200 N. E. 468, 5 Ohio Ops. 55).

Because the General Assembly saw fit to rely upon the enforcement of the federal law regarding obscenity and the activities of the post office department relative to second class mail, it cannot be construed that Ohio was protecting obscenity in that field. The post office department has regulations making nonmailable obscene matter at any time; the second class mail privilege could be revoked if it found that succeeding issues of a publication were obscene, although the original issue or issues (upon which the privilege had been granted) were not obscene; persons who violated the regulations by mailing obscene material could be reported to the federal authorities for criminal prosecution on a federal level.

The Federal Constitution does not require that state laws shall cover the entire field of proper legislation in a single enactment. There is no constitutional requirement that regulation must reach every class to which it might be applied. It is not unconstitutional merely because it is not all-embracing, and does not include all the evils within its reach. The state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. The legislature is not bound to extend a police regulation to all cases which it might possibly reach. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. The state may legislate in such a manner even though the forbidden act does not differ in kind from those that are allowed, because it is free to recognize degrees of harm and

may confine its restrictions to those classes of cases where the need is deemed to be clearest. Hence, it is not enough to invalidate a law that others may do a thing which is equally harmful and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection clause of the Fourteenth Amendment. This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. 12 *Am. Jur.* 160-163, Sec. 484.

Finally, the attack upon the constitutionality of Section 2905.34, in light of the provisions of Sections 3767.01 (c) and 2905.37, was thoroughly aired in the trial court, the district court of appeals, and the highest court of the state. The statute withstood the charges of arbitrariness, unreasonableness, and discrimination.

QUESTION 6.

This Honorable Court, aware of an outline of the evidence presented in the trial court, and cognizant of the Ohio court opinions at Appendices 2, 3, and 4, the Federal court opinion at Appendix 13, the local movie critic's opinion at Appendix 19, and a national movie critic's opinion at Appendix 20, has an insight into the contents of the film in issue.

Patent offensiveness, as well as prurient interest appeal, characterizes "The Lovers." The reaffirmance of *Roth v. United States, supra*, in the recently-decided case of *Manual Enterprises Inc. v. Day, supra*, as well as the standards enunciated in *Manual*, make it unnecessary for this Honorable Court to reconsider its previous rulings.

Nor does *Smith v. California, supra*, imply that a review would be in order.

CONCLUSION.

For the reasons set forth in this brief, supporting the grounds stated in the motion, it is again requested that Appellant's appeal be dismissed, or, in the alternative, that the order appealed from be affirmed.

July 27, 1962

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney
of Cuyahoga County, Ohio.

Of Counsel:
THOMAS L. OSBORNE,
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APPENDIX 1.

ORDER OF THE SUPREME COURT OF OHIO APPEALED FROM.

This cause, certified by the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is Ordered that no penalty be assessed herein.

It is further Ordered that the Plaintiff-Appellee recover from the Defendant-Appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX 2.

MAJORITY OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, WITH OPINION PARTIALLY CONCURRING AND PARTIALLY DISSENTING.

Defendant was indicted on two counts by the September 1959 Grand Jury of Cuyahoga County, Ohio, for violation of Section 2905.34, Revised Code. The first count in the indictment reads as follows:

> "* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit:
>
> "(Les Amants) 'The Lovers'
>
> "Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the

records thereof * * * and against the peace and dignity of the state of Ohio."

The second count in the indictment reads:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly exhibited a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

Section 2905.34, Revised Code, so far as it pertains to the defendant and his conduct on November 13, 1959, reads as follows:

"No person shall *knowingly* * * * exhibit * * * or have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film * * *.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

Upon arraignment the defendant entered pleas of not guilty to both counts of the indictment on November 30, 1959, and was released on bond.

On May 23, 1960, the defendant waived his right to trial by jury, both orally and in writing, and requested trial by a three-judge court. He was permitted to withdraw his pleas to make certain motions; thereafter the pleas of not guilty were re-entered and trial was had, resulting in a finding of guilty as charged in each count of the indictment.

The defendant was sentenced to pay a fine in the sum of $500 on the first count of the indictment and sentenced to pay a fine of $2,000 on the second count of the indictment and to stand committed to the workhouse of the city of Cleveland until such fine and costs were paid. Sentence was stayed pending appeal.

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is before this court pursuant to a certification of the record, the Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals of the Third Appellate District in the case of *State v. Wetzel*, decided December 10, 1960.

RADCLIFF, J. At the outset it is well to recall that an opinion of this court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case.

The defendant urges five assignments of error, the first two raising the constitutional issues involved. The third and fourth emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion. The final assignment of error raises the question of general prejudice.

There is an oft-quoted cliche to the effect that "it is not possible to legislate in the field of morals." The statement originally was and still should be, "it is not possible

to legislate morality for the people." In support of this, there is always cited the classic example of the Eighteenth Amendment to the United States Constitution. We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to re-elect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure or mode of selection, consequently its authority must be exercised with deliberate caution. *Lex citius tolerare vult privatum damnum quam publicum malum.*

We turn now to a consideration of the provisions of Section 2905.34, Revised Code, in relation to the various pronouncements of the Supreme Court of the United States in interpreting such statutes. The pertinent part of Section 2905.34, Revised Code, with which we are presently concerned, reads as follows:

> "No person shall *knowingly* sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession

or under his control an obscene * * * motion picture film * * *." (Emphasis added.)

At the outset it must be noted that the Supreme Court of the United States has held that obscenity is not protected by the constitutional provisions relating to freedom of speech. *Roth v. United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct. 1304.

In *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct. 215, however, the Supreme Court struck down a state statute which imposed strict criminal liability for the mere possession for sale of an obscene book, without requiring any knowledge of the contents of the book. The case reserved, however, the question as to the extent of knowledge required which would validate such a statute.

Such infirmity does not exist in the statute under our consideration. It is specifically required under Section 2905.34, Revised Code, that the acts punished thereunder shall be done knowingly. The act requires knowledge. The question, of course, is knowledge of what. It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved.

Two questions must be determined at this time. First, the test as to what is obscene. The definition which has now become classic was laid down in *Roth v. United States*, *supra*, as follows, at page 489:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather

what the community as a whole would consider obscene. There is no real or actual ambiguity in the phrase. No undue burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards, and as stated in *Roth v. United States, supra*, at pages 491 and 492:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' *United States v. Petrillo*, 332 U. S., 1, 7-8 [91 L. Ed., 1877, 67 S. Ct., 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.' "

The second question which arises is as to what extent a person is bound to have knowledge of the contents of that which he possesses. To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be presumed to know what they are dispensing. (*State v. Wetzel*, 173 Ohio St.,

16.) It is in the more ethereal region of theoretical literary endeavor that the principal problem arises. Here, once again, the community must be the test. A commercial possessor obviously can not be held to the duty of examining and determining for himself the obscenity of all matters which pass through his hands, neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under Section 2905.34, Revised Code.

Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section.

That there are marginal cases where such determination is difficult does not invalidate an otherwise valid enactment. *Roth v. United States*, *supra*, and *State v. Wetzel*, *supra*.

The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.

It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to the dissemination of obscenity, whether for profit or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole.

In the phrase, "knowingly possess," as used in criminal statutes, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and acts in furtherance thereof.

When this phrase is read in context with and in relation to the rest of the section, it is readily apparent that such phrase does not relate to the mere possession for private and personal gratification but rather to possession and control for the purpose of circulation or exhibition, a matter clearly within the power of the state to control under the police power.

The third and fourth assignments of error raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums. The facts were found by the three judges sitting as the triers of the facts who applied the standards prescribed in *United States v. Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. The producers, distributors and exhibitors evidenced so little responsibility in connection therewith that they have no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection. This is especially apropos of the First and Fourteenth Amendments to the Constitution of the United States.

There is a unique coincidence involving this case (*State v. Jacobellis*) and the case of *State v. Warth*, 173 Ohio St., 15, as the obscene material involved in both was Les Amants (The Lovers). However, the statute involved in each case is entirely different. Jacobellis was indicted, tried and convicted for violation of Section 2905.34, Revised Code. Warth was indicted, tried and convicted for violation of Section 2905.342, Revised Code. The latter statute attempted to make *mere* possession or exhibiting an obscene motion picture film a misdemeanor. In view of the pronouncements of this court in *City of Cincinnati v. Marshall*, 172 Ohio St., 280, 175 N. E. (2d), 178, and of the Supreme Court of the United States in *Smith v. California*, *supra*, and our high regard for the doctrine of *stare decisis*, the conviction of Warth was reversed due to the constitutional infirmity of Section 2905.342, Revised Code, in omitting the element of scienter or knowledge. The cases in reality had no common principle of law involved, and, consequently, the different conclusion reached in each can not provoke any possible question of inconsistency. Had

Warth been charged in Montgomery County with a violation of Section 2905.34, Revised Code, he would have been as guilty as we now find Jacobellis in Cuyahoga County.

As we find no error in the judgment of the Court of Appeals, such judgment is hereby affirmed.

Judgment affirmed.

ZIMMERMAN, acting C. J., MATTHIAS, BELL and O'NEILL, JJ., concur.

HERBERT, J., dissents.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

TAFT, J., concurring in part. I cannot be as positive in condemning the film involved in the instant case as the majority opinion is. However, in my opinion, reasonable minds could determine beyond a reasonable doubt that this film is, to use the words of the statute, "obscene, lewd, or lascivious."

I agree, therefore, with the judgment so far as it relates to the second count of the indictment charging defendant with exhibiting that film.

I also agree with the majority opinion that the word "knowingly" in the statute relates not merely to possession and control of the film but also to what is in the film.

However, I cannot agree with the judgment of this court, to the extent that it affirms the conviction of defendant on the first count charging defendant merely with knowingly possessing and having control of the film.

It is my opinion, as it was the opinion of Judges Bell, Peck, Herbert and myself in *State v. Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, that the portion of

the statute upon which the first count is based is constitutionally invalid. As stated in the opinion in that case:

> "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime * * *. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded."

Likewise, under this statute, if anyone looks at a movie film that he has lawfully acquired to determine whether he should exhibit it and finds it to be obscene, he is forthwith and at that instant guilty of a serious crime. As a result, some who might otherwise look at movie films that are not obscene to determine whether they should exhibit those films may well be discouraged from doing so and free circulation and exhibition of movie films will be impeded.

If Section 2905.34, Revised Code, providing that "no person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film" were reasonably susceptible of interpretation as a prohibition of possession or control of such a film only where such possession or control was for the circulation or exhibition thereof, I could also concur in the judgment so far as it affirms the conviction on the first count. Apart from some consideration of the legislative history of this statute, this court *might* be justified in proclaiming that there was a legislative intent that the "possession * * * or control," in order to be a crime, must be, to use the words of the majority opinion, "for the purpose of circulation or exhibition." But compare *State v. Warth*, 173 Ohio St., 15. As the majority opinion states, this matter is clearly within the power of the state to control under the police power.

It may be observed that it is probable that such a judicial proclamation of legislative intent would be helpful, if not conclusive, in avoiding a review by the United States Supreme Court of the constitutional validity of this portion of our statute.

However, the General Assembly has quite clearly indicated that it had no such intention. Thus, prior to 1939, the foregoing statute (then Section 13035, General Code) read so far as pertinent:

> "Whoever sells, lends, gives away [*i. e.*, circulates], exhibits * * * or has in his *possession for such purpose*, an obscene [etc.]." (Emphasis added.)

In that year, the General Assembly amended that statute by taking out the words "for such purpose" appearing after the word "possession," and added, after the latter word, the words "or has under his control." 118 Ohio Laws, 420.

The General Assembly thus quite clearly expressed a legislative intention not to modify the words "has in his possession or under his control" as the majority opinion and the decision in the instant case are modifying those words.

APPENDIX 3.

OPINION OF THREE-JUDGE DISTRICT APPELLATE COURT (175 N. E. 2d 123).

PER CURIAM:

This is an appeal on questions of law from a judgment arising from a decision rendered by the Court of Common Pleas of Cuyahoga County (Criminal Division) finding the defendant guilty as charged on two counts of an indictment as follows:

> "(1) Unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers), and:
>
> "(2) Unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers.)"

The defendant elected to be tried before a court of three judges pursuant to Section 2945.07, Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, pursuant to the provisions of Section 2945.05, Revised Code. The trial was commenced on May 23, 1960 and concluded on June 3, 1960.

Section 2905.34, Revised Code, under which the defendant was convicted, insofar as pertinent, reads as follows:

> "No person shall knowingly sell, lend, give away, exhibit or offer to sell, lend, give away or *exhibit*, or publish, *or have in his possession or under his control*, an obscene, lewd or lascivious book, pamphlet, paper, magazine, writing, advertisement, circular, print, picture, photograph, *motion picture film* * * *."

The defendant-appellant complains of many assignments of error, one of which is that he was erroneously charged and found guilty of two separate crimes under Section 2905.34, Revised Code, in that the first count

charged the defendant with knowingly having possession and control of a certain obscene, lewd and lascivious motion picture film, to-wit: "Les Amants," and the second count with unlawfully and knowingly exhibiting this same motion picture film. This assignment of error cannot be sustained.

This precise question was before the Montgomery County Court of Appeals, where defendant was found guilty by a jury on two charges, namely, (1) possessing and (2) exhibiting an obscene motion picture film "The Lovers," see opinion by Kerns, J., in *State vs. Warth*, (No. 2576) decided July 7, 1960. Appeal as of right to the Supreme Court dismissed *sua sponte* for reason no debatable constitutional question involved. *State vs. Warth*, 172 Ohio St. 246, decided May 3, 1961. While the conviction in the *Warth* case was for violation of Section 2905.342, Revised Code, nevertheless, the legal principles involved are identical as applied to the facts of the instant case.

Also, this same question was before this Court where one, Gevaras, was convicted in the Court of Common Pleas of this County on two counts of one indictment, 1) of knowingly possessing and the other of knowingly exhibiting the same "obscene, lewd, or obscene motion picture film" under the provisions of Section 2905.34, Revised Code. On appeal on questions of law, this Court affirmed the judgment of the Court of Common Pleas. Thereafter, the Supreme Court of Ohio dismissed the appeal as of right for the reason that "no debatable constitutional question" was involved. *State of Ohio, Appellee, v. Gevaras, Appellant*, 170 Ohio St. 404, 165 N. E. 2d 652 (February 3, 1960).

The remaining assignments of error are grounded principally upon the claim of the defendant that the provisions of the statute, namely, Section 2905.34, Revised

Code, are violative of the constitutional rights of the defendant and are, therefore, null and void.

The defendant contends that the moving picture film in this case is not obscene and that it is within the area of constitutionally protected freedom of speech or press.

This contention of the defendant cannot be sustained. As to the question of obscenity, the three judge trial court, after a lengthy trial, based upon the testimony of numerous witnesses, the viewing of the film and all the evidence, found the moving picture film in question to be obscene, lewd and lascivious within the definition, description and test set forth in *Roth v. United States*, 354 U. S. 476.

In negating the claim that obscenity is within the area of constitutionally protected freedom of speech or press, the Supreme Court of the United States in paragraph three of the syllabus of *Roth v. United States*, 354 U. S. 476, which was considered and decided June 24, 1957, together with the case of *David S. Alberts v. California*, on appeal from the Superior Court of California, Los Angeles County, held, inter alia, as follows:

> "Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States."

And, in syllabus four (c) of the *Roth* case, *supra*, it is stated:

> "The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

Further, the court held in paragraph six of the syllabus, at page 477:

"When applied according to the proper standard for judging obscenity, para. 311 of West's California Penal Code Ann., 1955, which, inter alia, makes it a misdemeanor to keep for sale or to advertise material that is 'obscene or indecent,' does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendment against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt."

The court, at page 487 of the Roth case, declared:

"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *"

The trial court, in finding the defendant guilty as charged, was governed by the standards defined and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving picture film, "Les Amants" we agree with and adopt the same as part of our opinion in this case, as follows:

"In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After

the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

"In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

"It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. 'Les Amants' (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

"Therefore, the Court finds the defendant guilty as charged in both counts of the indictment."

As to each count of the indictment, the three judge court imposed a fine only.

Considering the record as a whole, including a viewing of the film by this Court, the film being an exhibit in the case, we conclude that the judgment of guilty by the three judge court is amply sustained by the evidence and that no error intervened prejudicial to the rights of the defendant.

The judgment must be and, therefore, is affirmed.

KOVACHY, P.J., SKEEL, J., HURD, J. concur.

APPENDIX 4.

MEMORANDUM OPINION OF THREE-JUDGE TRIAL COURT.

Before William J. McDermott, P.J., Roy F. McMahon, J., and John Pincura, J., (Pincura, J., Court of Common Pleas (Lorain County) sitting by designation in Cuyahoga County).

PER CURIAM

The defendant was indicted on two counts under the provisions of Section 2905.34 of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers), and (2) unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers).

At the request of the defendant the cause was tried before a court of three judges under Section 2945.07 of the Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, filed in this cause and made a part of the record, all in accordance with the provisions of Section 2945.05 of the Revised Code.

In the motion picture *"Les Amants"* (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and

indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 US 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. "*Les Amants*" (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

Therefore, the Court finds the defendant guilty as charged in both counts of the indictment.

WILLIAM J. MCDERMOTT,
Presiding Judge.

ROY F. MCMAHON,
Associate Judge.

JOHN PINCURA,
Associate Judge.

APPENDIX 5.

STATUTE INVOLVED.

Ohio Revised Code Section 2905.34. *"Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes:*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, paper magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or

imprisoned not less than one nor more than seven years, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 8.)

APPENDIX 6.

RELATED STATUTE.

Ohio Revised Code Section 2905.342. "*Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited*:

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"(B) Any motion picture film, the exhibition of which has created a public disorder, or from the exhibition of which a public disorder is imminent.

"The exhibition of a motion picture film which teaches or advocates that the violation of any of the criminal laws of the state of Ohio or any of the criminal laws of the United States of America is a proper or desirable course of conduct shall, prima facie, be deemed to create an imminent public disorder for the purpose of initiating the arrest of any person for the violation of this section.

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 9.)

APPENDIX 7.

RELATED STATUTE.

Ohio Revised Code Section 2905.37. "*Legitimate publications not obscene*:

"Sections 2905.33 to 2905.36 inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-34.)

APPENDIX 8.

RELATED STATUTE.

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions*:

"As used in all sections of the Revised Code relating to nuisances:

" 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37 and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37. 39, at p. 201.)

APPENDIX 9.

RULE XX OF THE RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

RULE XX.

Rehearings—Issuance of Mandates.

Section 1. No motion can be made or heard for a rehearing. Application for rehearing of any cause or motion shall be made within fourteen days after the announcement of the decision. Such application may be either printed or typewritten, and nine copies thereof filed with the Clerk, and shall be confined strictly to reasons for a rehearing. No reargument of the cause on such application will be considered.

Section 2. When typewritten applications are filed the same shall meet the requirements of Section 11(a) of Rule II.

Section 3. Repealed January 18, 1955.

Section 4. One week after the announcement of the decision of any cause on the General Docket the Clerk shall issue a Mandate as provided by the entry of this Court; and one week after announcement of decision of a motion to certify the record or for leave to file an appeal, if such motions be overruled, the Clerk shall issue a certified copy of the entry of this Court to the lower Court; provided, that if the Clerk be notified, within one week after announcement of a decision on the motion or general docket that application for a rehearing will be filed, such Mandate or certified copy of entry shall be held until such application be disposed of by the Court or the time for filing the same has expired and shall be then forthwith issued. If an application be granted the former entry of this Court shall be thereby vacated and no Mandate or certified copy of entry shall issue until such rehearing has been had and the case or motion has again been decided.

APPENDIX 10.

EXCERPT FROM APPELLANT'S BRIEF IN THE SUPREME COURT OF OHIO.

* * * * *

In 1957, the Supreme Court of the United States attempted to redefine "obscenity" in *Roth v. United States*, 354 U. S. 476. In this most recent definition of "obscenity," the court stated the test to be:

> "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." *Id.* at 489.

This definition in the *Roth* case has already been rejected by the Supreme Court of Pennsylvania in *Commonwealth v. Blumenstein*, 396 Pa. 417 (1959). See also *William Goldman Theatres, Inc. v. Dana*, No. 530 Commonwealth Docket, 1959 No. 2385, C. P. Pa., July 30, 1960, and *Twentieth Century-Fox Film Corporation v. Boehm*, No. 538 Commonwealth Docket, 1959, No. 2387, C. P. Pa., July 30, 1960, in which the court followed the holding in the *Blumenstein* case, in finding that the term "obscene" was unconstitutionally vague.

The definiteness and workability of the definition in the *Roth* case is well worth the consideration of this court:

(a) *Prurient interest*—The term "prurient interest," as contained in the *Roth* case definition, added nothing new to the already existing definition of obscenity. *Webster's International Dictionary* (2d ed. 1959) defines prurient to include the more familiar terms of "lascivious" and "lewd." Thus, prurient interest provides no more objective definition than does the word "obscene" itself. For example, the charge of the trial court in the *Roth* case was, as follows:

"It must tend to stir sexual impulses and lead to sexually impure thoughts." (Record, p. 25, *United States v. Roth*, 237 F. 2d 796 (2d Cir. 1956).)

Apparently the United States Supreme Court, in affirming, approved a charge which defines "obscene" in terms of itself. *Webster's International Dictionary* (2d ed. 1959) states one of the definitions of the word "impure" to be "obscene." It is abundantly clear that although some may argue that "everybody knows what obscene means," no one can define it except in terms of itself. Appellant contends that the attempt of the prosecuting attorney to base a criminal conviction on terms as vague as those embodied in Section 2905.34, is not compatible with due process of law.

(b) *Dominant theme*—It is not every publication which "appeals to prurient interests" that is obscene. Rather, it is only those publications the dominant theme of which has this appeal. See *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S. D. N. Y. 1959). The subjective definition of "obscene" coupled with the determination of what is the "dominant theme" of a publication, a judgment which is also necessarily subjective, has played havoc with the orderly administration of justice. In fact, the determinations by lower courts in this area have become nothing more than a guessing game. For instance, see *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958), *reversing* 249 F. 2d 114 (D. C. Cir. 1957); *One, Inc. v. Oleson*, 355 U. S. 371 (1958), *reversing* 241 F. 2d 772 (9th Cir. 1957); *Times Film Corp. v. Chicago*, 355 U. S. 35 (1957), *reversing* 244 F. 2d 432, (7th Cir. 1957). In each of these cases the lower court had made its carefully considered determination that the material there involved was in fact obscene. However, the United States Supreme Court

reversed each of these decisions in a per curiam opinion, citing the *Roth* case. This record of lower court reversals is certainly not evidence that the definition in the *Roth* case provides to this appellant or to the courts, or for that matter, to any individual an ascertainable standard of conduct.

(c) *Contemporary community standards*—As yet, it appears that no court has determined what community's standards were to apply under the definition in the *Roth* case. Is it a nationwide standard, a statewide standard, or a local standard? And if it is the latter, is it the community in which the literature is published, the community in which it is read, or the community in which the literature is sold? Certainly, there is no national standard with respect to obscene literature in the United States. We are a country composed of fifty states with widely varying mores. This is abundantly clear as will be revealed by an examination of the various statutes of the states dealing with liquor, gambling, fornication and adultery. Once more, it is impossible to contend that the State of Ohio is a community in the sense that it has one moral standard. Literature which might be considered shocking in Ohio's rural areas may well be considered commonplace in Ohio's large industrial centers. There is grave doubt that even the residents of Cuyahoga County, or, in fact, the residents of the City of Cleveland, share a common standard. How is the standard of any community to be determined? Is it that which is distasteful to the average member of the community? Can such a determination be made by plebiscite? Can the First and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Constitution of Ohio be interpreted to allow the literary tastes of the average to govern that which the minority may read? Appellant submits that they cannot. In fact,

the "contemporary standard of the community" is no standard at all.

Although it may be argued that the test in the *Roth* case is determinative, at least for the moment, of the constitutionality of a statute proscribing the dissemination of "obscene" material insofar as the United States Constitution is concerned, the *Roth* decision is not binding in any manner as to the application to such a statute of Article I, Section 16 of the Constitution of the State of Ohio. The First Amendment to the Federal Constitution provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

Article I, Section 11 of the Constitution of Ohio contains the following:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press * * *."

It thus appears that the guarantee of freedom of speech contained in the Ohio Constitution is even stronger than its counterpart in the Federal Constitution as contained in the First Amendment. It was on the basis of a similar comparison that the Courts of the Commonwealth of Pennsylvania have rejected the test set forth in the *Roth* case for the reason that it is too vague. *Commonwealth v. Blumenstein, supra; William Goldman Theatres, Inc. v. Dana, supra; Twentieth-Century-Fox Film Corp. v. Boehm, supra.*

Further, the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 573 (1961), a decision rendered on May 25, 1961, held that it was not bound by the test in the *Roth* case as applied to its Penal

Law. Rather, because of the vagueness of the *Roth* definition, that court held that the New York Penal Law should be applied only to "hard-core pornography."

Appellant requests this Court to reject, as did the Supreme Court of the Commonwealth of Pennsylvania and the Court of Appeals of New York, the test announced in *Roth v. United States*, for the reason that it is unconstitutionally vague, and for the further reason that it is impractical and unworkable.

* * * * *

APPENDIX 11.

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, STATE OF OHIO vs. WARTH, (173 Ohio St. 15, 179 N. E. 2d 772).

(No. 36964—Decided January 17, 1962.)

APPEAL from the Court of Appeals for Montgomery County.

The defendant, as manager of a theatre in the city of Dayton, gave a public showing of a film titled "The Lovers." Because of such showing of the film, an affidavit was filed in the Dayton Municipal Court charging that defendant did "unlawfully exhibit, or have in his possession, or under his immediate control an obscene motion picture film contrary to Section 2905.342 of the Ohio Revised Code and against the peace and dignity of the state of Ohio."

Section 2905.342, Revised Code, reads in part:

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"* * *

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

Defendant entered a plea of not guilty and was tried to a jury in the Dayton Municipal Court, found guilty as charged in the affidavit, sentenced to imprisonment in the workhouse of the city of Dayton and ordered to pay a fine and costs of the prosecution.

The Court of Appeals, on appeal from the Municipal Court, affirmed the judgment.

The allowance of a motion to certify the record brings the cause to this court for review.

Mr. Arthur O. Fisher, city prosecutor, *Mr. Henry W. Phillips* and *Mr. Edward J. Duffy, Jr.*, for appellee.

Messrs. Wright, Harlor, Morris, Arnold & Glander, for appellant.

Per Curiam. Section 2905.342, Revised Code, making it a misdemeanor to have in one's possession an obscene motion picture film, without reference to knowledge or scienter on the part of an accused, is unconstitutional. *City of Cincinnati v. Marshall*, 172 Ohio St., 280; *Smith v. California*, 361 U. S., 147.

The judgment of the Court of Appeals is reversed.

Judgment reversed.

ZIMMERMAN, acting C. J. RADCLIFF, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

APPENDIX 12.

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, STATE OF OHIO vs. WETZEL, (173 Ohio St. 16, 179 N. E. 2d 773).

(No. 36945—Decided January 17, 1962.)

CERTIFIED by the Court of Appeals for Wyandot County.

Edward J. Wetzel, the appellee herein, was indicted by the Grand Jury of Wyandot County in the following language:

> "The jurors of the Grand Jury * * * do find and present that Edward J. Wetzel * * * on the 8th day of February * * * 1960, at the county of Wyandot aforesaid, did unlawfully and knowingly have in his possession and under his control, obscene, lewd and lascivious picture photographs, pamphlets and other articles all of an indecent and immoral nature and all of which are too obscene for further description within the limits of decency and contrary to Section 2905.34 of the Revised Code of Ohio, and against the peace and dignity of the state of Ohio."

He pleaded not guilty and was tried before the Court of Common Pleas. A verdict of guilty was returned by the jury, and the defendant was sentenced to imprisonment in the Ohio Penitentiary.

An appeal on questions of law to the Court of Appeals resulted in a reversal of the judgment below and an order directing the discharge of the defendant. Such reversal was based on the determination that the part of Section 2905.34, Revised Code, under which the defendant was indicted and tried, is unconstitutional and void, being in violation of "Article I, Section 11 of the Constitution of Ohio and the provisions of the First Amendment to the Constitution of the United States."

The judges of the Court of Appeals, finding the judgment rendered to be in conflict with the judgment of the Court of Appeals for Cuyahoga County in the case of *State v. Mapp* (March 31, 1959), certified the record to this Court for review and determination.

Mr. Forrest H. Bacon, prosecuting attorney, for appellant.

Mr. Francis M. Marley, for appellee.

ZIMMERMAN, acting C. J. Section 2905.34, Revised Code, in its pertinent parts reads as follows:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print [or] picture * * *.
>
> "Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

On the trial, evidence presented by the state showed that on February 8, 1960, pursuant to a telephone call, the sheriff of Wyandot County went to a farm owned by the defendant's mother-in-law and located on a county road in Wyandot County some two and one-half to three miles west of the city of Carey. There, in a small barn on the premises, the sheriff found a chained and padlocked automobile trailer belonging to the defendant and admittedly placed there by him. The sheriff cut the chains, opened the trailer and discovered over 19,000 packaged duplicate items wrapped in brown paper sacks and consisting of illustrated pamphlets, photographs and reproductions of photographs and pen-and-ink drawings accompanied by reading matter, most of which material was of the lewdest and most lascivious character—an assorted collection of filth, shocking and repugnant to the average normal in-

dividual of any locality; in short, pornography at its very worst.

On the following day, the defendant was apprehended and charged with the crime defined in Section 2905.34, Revised Code. There were found in his possession keys which fitted the padlocks fastening the chains on the trailer.

Witnesses who lived nearby testified that to their knowledge defendant visited the part of the barn in which the trailer was housed some seven or ten times between November of 1958, when the trailer was placed in the barn, and February of 1960 and remained for periods of from ten to fifteen minutes to an hour. On one occasion, one of the witnesses observed the defendant carrying from the barn a brown colored package resembling and about the size of a shoe box. The defendant told the witness that, upon request, he occasionally sold material contained in the trailer.

In his own defense, defendant testified that he had not placed the chains and padlocks on the trailer and was unaware of the trailer's contents. He said that he had leased the trailer to another, with the privilege of purchase, and that he, defendant, visited it solely to see whether it was intact and unmolested. Defendant testified further that he secured the keys to the padlocks from the one to whom he had leased the trailer, and that such person was then serving a term in the Ohio Penitentiary.

The only other witness appearing for the defendant was a medical doctor who was treating the defendant professionally. He testified as to defendant's poor physical condition due to a heart ailment, hardening of the arteries and other disorders of internal organs. He said further that the defendant was incapable of strenuous physical activity.

It is a well established principle of law that a statute,

under one application, may operate unconstitutionally, but, under another and different application, its operation may be perfectly valid. Such was the pronouncement of the Supreme Court of the United States in the cases of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S., 282, 66 L. Ed., 239, 42 S. Ct., 106, second headnote; and *Alabama State Federation of Labor v. McAdory*, 325 U. S., 450, 462, 89 L. Ed., 1725, 1735, 65 S. Ct., 1384, 1390. Or, as was held by this court in the first paragraph of the syllabus of *State, ex rel. Herbert v. Ferguson, Aud.*, 142 Ohio St., 496, 52 N. E. (2d), 980, "where, under one state of facts, the operation of a statute is constitutional, a court will not declare it invalid because under another state of facts, not involved, its operation would be unconstitutional."

To the same effect, see *State, ex rel. Speeth et al., Board of County Commrs., v. Carney, Aud.*, 168 Ohio St., 159, 126 N. E. (2d), 449.

Here, under the state's evidence, the deduction is warranted that this large quantity of pornographic material was possessed by defendant with knowledge of its nature, and that it was held for sale and distribution. The situation differs from one where an individual merely possesses material of that kind for his own private purposes.

Therefore, we think the quoted portions of the statute are constitutional and valid as applied to the defendant under the evidence outlined above.

The instant case is unlike that of *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215. That case involved an ordinance of the city of Los Angeles making it unlawful for any person to have in his possession any obscene or indecent book in any place where books are sold or kept for sale. The court construed the ordinance as fixing strict or absolute criminal liability, without requir-

ing any element of scienter, *i.e.*, knowledge by the defendant bookseller of the contents of the book for the possession of which he was convicted. The majority of the court held that that ordinance, although directed to obscene matter, violated the constitutionally protected rights of freedom of speech and of the press, because it lacked the element of scienter on the part of the bookseller.

Surely the state in the exercise of its sovereign power may enact and enforce legislation designed to protect its people, particularly the young, inexperienced and unsophisticated, from the corrupting and degrading influence of what is plain unmitigated filth.

We are not confronted here with an illegal search and seizure in violation of defendant's constitutional rights. No objection was made by defendant in the trial court to the introduction of the pornographic material taken from the trailer on that ground, and that there may have been an illegal search and seizure was mentioned only casually in the Court of Appeals. *State v. Mapp* (U. S.), 6 L. Ed. (2d), 1081, 81 S. Ct., 1684.

The judgment of the Court of Appeals is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.

RADCLIFF, MATTHIAS, BELL and O'NEILL, JJ., concur.

TAFT, J., dissents for the reason stated in the majority opinion in *State v. Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, and in the concurring opinion in *State v. Jacobellis*, 173 Ohio St., 22 at page 29.

HERBERT, J., dissents for the reason stated in the opinion in the case of *State v. Mapp*, 170 Ohio St., 427, 166 N. E. (2d), 387.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District sitting by designation in the place and stead of ZIMMERMAN, J.

BELL, J., concurring. The authorities cited in the majority opinion herein clearly support the proposition stated in the first paragraph of the syllabus to the effect that, under one application, a statute may operate unconstitutionally yet, under another and different application, may operate validly.

Possession of nearly 20,000 copies of pamphlets, photographs and drawings which, to give them their most charitable description, can only be designated as hard-core pornography could be for one purpose and one purpose only—dissemination for profit. The intent of the Legislature in enacting Section 2905.34, Revised Code, must have been to prevent such dissemination or some other equally pernicious guilty purpose; it can not be assumed that the Legislature intended a deliberate invasion of personal freedoms.

Such an intent is a far cry from intending to make guilty under this statute a person who has in his personal library an isolated example of what might be many, or even by a few, be termed obscene. It is a far cry from intending to make guilty a clerk of courts who accepts for filing an exhibit or a judge or juror who later examines such exhibit, knowing or believing it to be obscene. All would be equally guilty if we assume that the Legislature intended that no guilty purpose need accompany the knowingly possessing.

In drawing a line between concepts as basic as personal freedom and the police power, a fine-pointed pen is often required. But fine or broad, the line must be drawn with reason. If, by judicial interpretation, that line can, with reason, be drawn so as to accomplish the pur-

pose sought by the exercise of the police power and at the same time protect the freedom of the individual, it should be so drawn.

The interpretation given this statute herein, and in the majority opinion in *State v. Jacobellis*, 173 Ohio St., 22, is, in my opinion, the only reasonable interpretation that can be given it. If, by implying the elements of guilty knowledge and guilty purpose, the salutary effect that it may be hoped the statute will have on our society can be given impetus, then that implication should be made. To interpret it, on the other hand, in such a way as to make mere knowingly possessing unlawful without either guilty knowledge or purpose accompanying that possession would, of necessity, make its application unconstitutional as the majority of this court felt was the result of such application in *State v. Mapp*, 170 Ohio St., 427.

APPENDIX 13.

OPINION OF THE U. S. DISTRICT COURT, N. D. ILLINOIS, E. D., ZENITH INTERNATIONAL FILM CORPORATION vs. CITY OF CHICAGO, (183 F. Supp. 623).

CAMPBELL, *Chief Judge*.

* * *

From the opening scene in this motion picture, the appeal to the prurient interest is presented in a tantalizing increasing tempo which intensifies the sexual desire to its apex when the wife and archeologist engage in the anticipated act of sexual intercourse in her bedroom.

The actual bedroom scenes begin, after a series of moonlight scenes which serve to whet the sexual appetite, with the impassioned lovers frenziedly undressing one another in such a manner as to suggest complete nakedness.

Upon entering the bed and as the acts begin, the film registers every possible emotion of sexual feeling and pleasure on the wife's face and then shifts to her writhing, contorted arm, hand and body as sexual climax approaches and occurs.

Those scenes immediately following suggest sexual gratification as the lovers lie in bed in apparent naked contentment and then, later, as they playfully disport in the same tub.

I find that the motion picture, viewed as a whole, is completely centered around and dominated by sexual play and gratification.

(9) For these reasons, I find that the motion picture, "The Lovers," appeals to the prurient interest, is obscene, and therefore censorable under the Chicago ordinance.

* * *

APPENDIX 14.

CLEVELAND PLAIN DEALER, Thursday, November 12, 1959
CLEVELAND NEWS, Wednesday, November 11, 1959

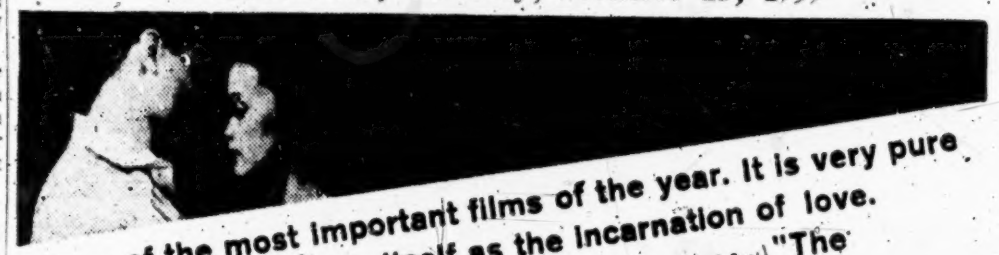
When all conventions explode ... in the most daring love story ever filmed!

The LOVERS

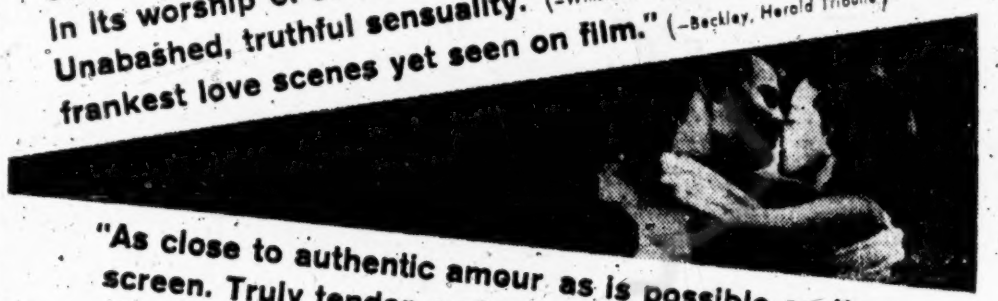
starring Jeanne MOREAU - Jean Marc BORY

HEIGHTS ART THEATRE

CLEVELAND NEWS, Thursday, November 12, 1959



"One of the most important films of the year. It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality." (-Winsten, New York Post) "The frankest love scenes yet seen on film." (-Beckley, Herald Tribune)



"As close to authentic amour as is possible on the screen. Truly tender and compassionate examination of a sudden torrid love affair. Jeanne Moreau is superb." (-Weiler, New York Times) "Most revealing story of illicit love that has yet come out of France." (-Hale, Daily News)

the Lovers

starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Starts TONIGHT!

HEIGHTS Art Theatre 2781 EUCLID HTS. BLVD. Phone YE 2-5955 FREE PARKING!

Show Time: 7:15, 9:05

GET MORE OUT OF LIFE—GO OUT TO A MOVIE MEMBERS CLEVELAND

THE CLEVELAND PRESS, Thursday, Nov. 12, 1959 APPENDIX 16.

NEW YORK LOVES "THE LOVERS"

"As close to authentic amour as is possible on the screen–Truly tender and compassionate examination of a sudden torrid love affair...Jeanne Moreau, is superb."
— Weiler, New York Times

"Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair. Something of a sexual revolution appears to be going on in the cinema and Malle may well be one of the prophets."—Alpert, Saturday Review

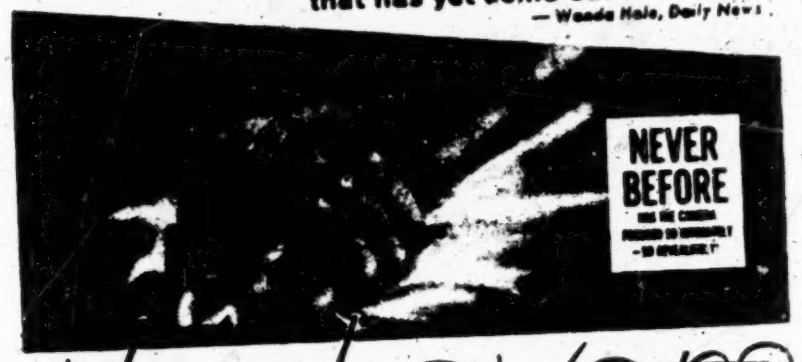
"This beautiful, rare film is the outstanding one to see."
—Gessel, The New Yorker

"Contains one of the longest and most sensuous love scenes to be seen in this country."—Newsweek

"One of the important films of the year. It is very pure in its worship of sex itself as the incarnation of love."—Winsten, N. Y. Post

"The frankest love scenes yet seen on film."
— Beckley, Herald Tribune

"The most revealing story of illicit love that has yet come out of France."
— Wanda Hale, Daily News



the Lovers

starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Starts TONITE

HEIGHTS

Show Time: 7:15; 9:05

APPENDIX 17.

CLEVELAND NEWS, Friday, November 13, 1959

NEW YORK LOVES "THE LOVERS"

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— Wanda Hale, Daily News

. . . and THE CLEVELAND NEWS ALSO LOVES "THE LOVERS." says Arthur Spaeth: **"Artful cinema. I salute the sensitivity and excellently cinematic virtues of an adult observation of love . . . Uncommon picturization . . . a remarkable acting company."**

the Lovers

Starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Now Showing! HEIGHTS TONITE AT 6:45, 8:15, 10:00

APPENDIX 18.

CLEVELAND PLAIN DEALER, Friday, November 13, 1959

NEW YORK LOVES "THE LOVERS"

"As close to authentic amour as is possible on the screen—Truly tender and compassionate examination of a sudden torrid love affair...Jeanne Moreau, is superb."
— Weiler, New York Times

"Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair. Something of a revolution appears to be going on in the cinema and Malle may well be one of the prophets."—Alpert, Saturday Review

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the Lovers

Starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Now Showing! HEIGHTS TONITE AT 6:45, 8:15, 10:00

ADVENTURE IN FILTH

Full Condemnation for 'The Lovers'

By W. WARD MARSH

"The Lovers"

Heights-Art

* * *

"THE LOVERS" ("Les Amants") drama in Cinemascope from France with English titles, directed by Louis Malle, who also wrote the screen play. From the novel, "Pointe de Lende-main," by Dominique-Vivant. A Zenith International presentation played by the following cast:

Jeanne.....Jeanne Moreau
Henri.....Alain Cuny
Raoul.....Jose-Luis de Villalonga
Bernard.....Jean-Marc Bory
Maggy.....Judith Magre
Servant.....Gaston Modot

When I began this business of looking seriously at motion pictures, I honestly never dreamed that I would have to review a "stag" movie.

This, then, is my first review of such picture and the first of its kind I have ever seen. I lay no claim to purity. At the same time, I want no part of filth . . . least of all on the motion picture screen.

Without its shockingly nasty climax, "The Lovers" would be shunned by all moviegoers. With it, the prurient-minded will have a ball.

I have read out-of-town reviews by the so-called cognoscenti and the intelligentsia who have declared "The Lovers" to be screen poetry. The verdict here: a dull picture until it turns to screened pornography, and then it becomes nauseous.

The Story

Suppose for the moment I condone its pornographic sequences — which I do not! — there are other entirely destructive moral issues which are almost as unacceptable, or will be unacceptable to people who consider themselves as decent folk.

This other phase can be most easily exposed by relating quite briefly the story of "The Lovers."

A married woman, living in a major city, regularly visits Paris. I base my estimate of the size of her city by the fairly large newspaper plant which her husband owns and operates.

He apparently doesn't care much for her. So, she goes to Paris to see a long-time friend and to have a mild flirtation with a polo player. It is mild compared with what happens later in the film.

When her husband insists that she invite these friends down to their rural chateau, she does this but is late arriving home because her car breaks down. She is given a lift by a sour-faced archaeologist. Husband insists that the new guest remain for the night.

This guest is left downstairs to play records, have a nightcap, etc., but he strolls over the estate in the moonlight and is soon joined by the wife in chamber attire.

Before a cloud can obscure the moon they are in each other's arms. This continues as they stroll, as they take a boat ride and as they return to the house where the guest is ushered into her room while she tucks her small daughter in for the night and tells the sleeping child that she is her love.

Now, aside from the chamber scene which is at once disgusting and revolting, adultery is more than pardoned when the pair of lovers ride off into whatever their future holds for them, or, possibly as long as the gasoline holds out.

The early chapters are dull beyond belief. The husband's attitude toward his wife is so contrived that adultery can be anticipated long before it happens.

Perhaps the "surprise," and the quotes are needed, comes because one has expected the virile polo player to be the chamber guest when actually it turns out to be the archaeologist whose manliness is distinctly open to question.

None of the players is worth a line of type.

By exhibiting "The Lovers" the Heights-Art has done incalculable harm to all other theaters showing decent motion pictures.

"The Lovers" lights every censorship torch. It will be a very great calamity when or if all other good, clean, honest, decent motion picture theaters have to atone for the curse which one theater can put upon them all.

CURLY-HAIRED VICTOR MATURE is bewitched and then virtually scalped by Hedy Lamarr as the Biblical siren of the late Cecil B. DeMille's successful movie being revived by Loew's State Theater today. It's "Samson and Delilah," in which Mature portrays the mighty warrior who fights the Philistines single-handed.

AMUSEMENTS

Public Hall—Sun., Nov. 15, 5 p.m.
115 Member
VIENNA PHILHARMONIC ORCHESTRA
Herbert Von Karajan, Conductor
Program

Symphony No. 5 in C Minor, Opus 67—Ludwig von Beethoven
Till Eulenspiegel's Merry Pranks, Opus 29—Richard Strauss
Suite from "The Water Music"—Georg Friedrich Handel
Tickets: $5.00, 4.00, 3.00, 2.00

MUSIC HALL ONE NIGHT ONLY WED., NOV. 18 AT 8:30

DIRECT FROM WORLD-FAMED HOLLYWOOD BOWL
Miss Patricia Morison
in the
STEPHEN PAPICH PRODUCTION
of
GAY '90s NITE
with The Gaslight Orchestra • Hapsburg Ballroom Octet
Parc Davis Soubrette • Highlights from "The Merry Widow" Musicale
The Most Exciting New Attraction!
ON NATIONAL TOUR
SEASON'S TOP MUSICAL BOUQUET
★ ★ ★ COMPANY OF 62 ★ ★ ★
FUN FOR ALL THE FAMILY
Tickets $4.50-4.00-3.00-2.50-2.00

Cleveland Opera Association—2816 Euclid Ave.—MAin 1-8826
Mail Order Accepted—Tickets at Burrows, 419 Euclid
For your convenience tickets may be ordered and charged through Higbee's Music Center—CH 1-4400

BURLESQUE

AMUSEMENTS

FIRST TIME IN CLEVELAND
The Comedy Sensations of The Sophisticated Set
TONY & EDDIE
The Raves Are International
• 2 Yea
• 1 Year

GARDEN NOW
FIVE GATES TO HELL
GRUEL!
also "OREGON TRAIL"

LYCEUM NOW
FIVE GATES TO HELL
GRUEL!
also "OREGON TRAIL"

LaSALLE NOW
FIVE GATES TO HELL

the personality she has evolved to replace the "little girl" she once protected is tainted with just the right amount of sophistication. Miss Caron's acting effects are more consciously and artfully achieved than many hitherto have perceived.

Cesare Danova plays the soldier-of-fortune. He acts well, especially in the renunciation scene, but he is so unprepossessing! European women, however, seem to like him.

I'm not quite sure what Johnson intended by the gangster and the baron whom the gangster takes under his wing. That Hollywood [redacted] shots have used gangsters in [redacted] hensible capacities has been [redacted] before (most recently [redacted] *Kurfs*). But Willie [redacted] the type. As for [redacted] son depicts [redacted] tatonic alcoh[redacted] then the baron [redacted] lovers should never [redacted] kills the gangster who [redacted] kill the soldier-of-fortune, [redacted]n raises symbolical intimations of sociological ideas and issues he never develops.

Nor does he make Willie's character clear. I'm willing to go along with those who say Willie's failure to consummate the marriage was a recoiling self-immersion in work after too many Hollywood dames. Others, I realize, leapt to a different suspicion.

It would be interesting to know just what Johnson intended originally, what occasioned his various changes of mind; what his opinion is of the picture as it is now. H. H.

THE 400 BLOWS

Written, directed and produced for $65,000 in France by young Louis Truffaut, this little film re-asserts the truism that some juvenile delinquency results from the ignorance, stupidity and selfishness of grown-ups.

The 12-year old boy who here suffers psychic blow upon blow, was born illegitimately to an instinctual ignoramus who [redacted]hen faithless to another lo[redacted] the decency to marry [redacted]chool teacher [redacted] who misinter[redacted]al impulses in the [redacted]

[redacted]able art is required to ani[redacted]ch cliché script situations and [redacted]racter motivations. No such art [redacted]s visible here. The all-important boy-actor (Jean-Pierre Leand) is not too appealing, and the rest of the players are indifferent actors. Henri Decae's black-and-white photography is adequate, but Truffaut's direction is amateur.

However, Truffaut is still very young. And to his credit is the fact that instead of exploiting sex, sensationalism and despair in his first feature film, he elected to deal with subject matter that has human as well as social importance.

LOUISE CORBIN

THE LOVERS

It is pictures such as this that make the commercialism of Hollywood seem relatively wholesome.

The script of *The Lovers* is an unbelievable contrivance to lead up to one scene in which the camera records

at length the facial reactions of a woman during cunnilingus.

Brahms, polo, a beautiful estate outside Dijon, and other socially acceptable *divertissements*, are used to lift *The Lovers* out of the class of "smoker" pornography and into the class of pornography for "cultivated" degenerates.

Louis Malle wrote and directed, and Jeanne Moreau played the wife who, while her husband, Paris lover and child are in the house, gives herself to another man.

They should be ashamed, as should everybody else connected with such low-grade, anti-social money-grubbing.

A SUMMER PLACE

Written, dire[illegible] produced by Delmer Dave[illegible] *Place*, like *Blue Denim*[illegible] teenage sexual inter[illegible] the inadequacies of pa[illegible] ward as justification giving in to sexual desire. we are left to believe the te[illegible] with a baby on the way, will married and make a living runnin[illegible] a summer hotel on an island off the New England coast.

There are other strands in the above story. Arthur Kennedy plays a drunken descendant of a once honorable New England family; Dorothy Maguire is the wife who had never loved him and had had an affair with Richard Egan before *her* marriage (an affair she resumes after 20 years). It is her son by Kennedy who impregnates the daughter Egan had by the wife he married on the rebound from Maguire. Egan's wife, in a badly written role, is overplayed by Constance Ford. The teenagers are played by Sandra Dee and Troy Donahue.

All the above is supposed to take place along the Atlantic coast. It was beautifully photographed in color by Harry Stradling at Carmel, Pacific Grove and Pebble Beach in California.

I can only hope *A Summer Place* will seem as unrealistic to teenagers as it did to me. ELLEN FITZPATRICK

THE SINS OF LOLA MONTES

Max Ophuls' last film, *Lola Montes*, much touted in Europe several years ago, is not being shown here in its original form. Some 40 minutes have been hacked away, following considerable re-editing. The incoherent result, needless to say, is quite different from Ophuls' original conception, which was said to have been modelled upon the unorthodox story-telling de[illegible] of *Citizen Kane*.

[illegible] great pity we are forced to [illegible]ture in such a mutilated [illegible]uch of what remains [illegible] and the English du[illegible] good. The Eastma[illegible] is beautiful, as are [illegible] decor. Indeed, some o[illegible] lighting and virtuo[illegible]rk are breath-taking.

It is impossible to tell whether or not in the original the visuals were matched by effective drama. Certainly there is cinematic style, and more than a hint of adroit acting, especially by Anton Walbrook as King Ludwig of

APPENDIX 21.

BILL OF PARTICULARS, COURT OF COMMON PLEAS.

Responding to the request of the defendant for a bill of particulars, the prosecuting attorney says that, on the trial of the above-entitled cause, the plaintiff will prove:

(a) That the defendant had the said motion picture film in his possession and under his control in his position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations of Heights Art Theatre, a movie house in the City of Cleveland Heights, in which movie house the said motion picture film was located and at which the said motion picture film was exhibited.

(b) That the defendant, in his position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations of the said Heights Art Theatre, exhibited the said motion picture film through the medium and services of a motion picture projectionist who operated a machine commonly known as a movie projector; which projector cast images from the said motion picture film onto a surface commonly known as a movie screen in view of the theater patrons; and which projector caused words, spoken dialogue, music, and other sounds to be transmitted from a sound track on the said motion picture film through an amplifier and made audible to the theater patrons.

JOHN T. CORRIGAN,
County Prosecutor,

By (Signed) THOMAS L. OSBORNE,
(Signed) BERNARD J. STUPLINSKI,
Assistant County Prosecutors.

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Supreme Court of the United States

OCTOBER TERM, 1962

No. 11

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

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On the Brief,
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Supreme Court of the United States

OCTOBER TERM, 1961.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

APPELLANT'S BRIEF OPPOSING THE MOTION TO DISMISS OR AFFIRM.

The brief submitted for the State of Ohio cites *Zenith International Film Corp.* v. *City of Chicago*, 183 F. Supp. 623 (D. C. N. D. Ill. 1960) as legal authority to support its contention that the film "The Lovers" is obscene. The case is the first one cited in Appellee's brief (at p. 6), and a portion of the opinion in that case is appended to the brief (at pp. 75-76). If it wished to cite and rely on the opinion of the District Court in the *Zenith* case, the Appellee was under a duty to inform the Court that the judgment was reversed on appeal, see *Zenith International Film Corp.* v. *City of Chicago*, 291 F. 2d 785 (7th Cir. 1961). The ground for reversal was that the City of Chicago had not accorded the owner of the film a "full and fair hearing". Thereafter the Chicago Board of Censors reviewed its prior decision and in August 1961 issued a permit

authorizing the exhibition of the same film that Appellant was convicted of possessing and showing. We cannot state whether Appellee's dereliction was due to ignorance or lack of candor. It is nevertheless clear that the subsequent history of the case relied on by the Appellee leads to a conclusion contrary to that for which it is cited.[1]

The Appellee's Brief discusses the questions presented by this appeal in the order set forth in our Jurisdictional Statement, and we shall comment on Appellee's arguments in that order.

Appellee's Argument with Respect to the Question (1) *Whether Section 2905.34 of the Ohio Revised Code on its face and as applied in this case violates the Federal Constitutional guarantees of freedom of communication because it punishes the mere private possession of obscene material without regard to the nature and purposes of the possession.*

As shown in the Jurisdictional Statement, at the time Appellant was convicted Section 2905.34, as interpreted by the Supreme Court of Ohio and by the Trial Court in which Appellant was convicted, punished the mere private possession of obscene material. Thereafter the Ohio Supreme Court revised its interpretation and ruled, in affirming Appellant's conviction, that possession of obscene material is unlawful only if such possesion is for a guilty or an illicit purpose. (Appellant's Jurisdictional Statement pp. 8-10.)[2] The Appellee argues that there was no change in the construction of the statute because it was

[1] Canon 22 of the Canons of Professional Ethics declares that it "is not candid or fair for the lawyer * * * with knowledge of its invalidity, to cite as authority a decision that has been overruled * * *."

[2] Judge Taft, in his dissenting opinion below, suggested that the changed interpretation of the statute "would be helpful" in

at all times capable of both interpretations (namely, that it provided for punishment of mere possession of an obscene film, and also for possession of an obscene film for an unlawful purpose) and that the two interpretations are consistent (Appellee's Brief, pp. 13, 15).[3]

We cannot agree with Appellee that the Ohio Supreme Court's ruling in *State* v. *Mapp*, 170 Ohio St. 427,[4] that Section 2905.34 of the Ohio Revised Code *does not* require a showing of wrongful purpose is consistent with its later determination that the same statute *does* require a showing of "a guilty or wrongful purpose". (*State* v. *Jacobellis*, 173 Ohio St. 22 at 27.) But if we accept Appellee's argument that the statute had both meanings (one constitutional and the other unconstitutional) the law must for that reason be held unconstitutional. This Court said in *Smith* v. *California*, 361 U. S. 147, 151:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution. Thornhill *v.* Alabama, 310 U. S. 88, 97, 98 Cf. Stanb *v.* Barclay, 355 U. S. 313."

---

avoiding a review by this Court (173 Ohio St. at p. 30). The change in interpretation, being a "device to prevent a review of the decision of the federal question", cannot defeat this Court's jurisdiction on appeal. *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164; *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 22; *Patterson* v. *Alabama*, 294 U. S. 600, 602; and see, *Fiske* v. *Kansas*, 274 U. S. 380, 385-86; *Norris* v. *Alabama*, 294 U. S. 587, 590.

[3] Appellee's argument that the statute had both meanings is based on the premise. "The generic concept of *possession* includes within its ambit the species of possession for the *purpose of exhibition*" (emphasis Appellee's, Appellee's Brief at p. 13).

[4] See also *Mapp* v. *Ohio*, 367 U. S. 643 at 686.

Moreover, Appellant's conviction cannot be sustained merely because the language of the statute permits a constitutional interpretation, for the Court that tried and convicted Appellant did so under a construction that clearly is violative of the Constitution. See *Jones* v. *Opelika*, 316 U. S. 584, 600 at 603, dissenting opinion, adopted by the Court on rehearing, 319 U. S. 103 and *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453, 456.

Appellee's Argument with Respect to the Question (2) *Whether Section 2905.34 of the Ohio Revised Code as interpreted and applied in this case violates the Federal Constitutional guarantee of freedom of communication because it provides for punishment of one who possesses or exhibits obscene material though he may not know the material is obscene, and may have cogent reason for believing that the material is not obscene.*

Appellee contends that the question presented and left undetermined by this Court in 1959 in *Smith* v. *California*, 361 U. S. 147 at 154, was answered in 1896 and in 1897 in *Rosen* v. *United States*, 161 U. S. 29 and *Price* v. *United States*, 165 U. S. 311. The *Price* and *Rosen* cases were prosecutions under a federal obscenity statute. In the *Price* case the Court found an indictment under the statute sufficient

> "because it does, in ~~fact, contain a charge~~ that the book was obscene, *to the knowledge of the defendant*, who knowingly and wilfully, with such knowledge, deposited in the mail and thus violated the statute. No one, on reading the third and fifth counts of the indictment, could come to any other conclusion in regard to their meaning . . ." 165 U. S. at 314 (emphasis ours).

If at all pertinent to the question under consideration, *Price* supports the claim urged in the Jurisdictional Statement that one who does not know material is obscene and has cogent reason for believing it is not, may not constitutionally be convicted under a statute punishing the dissemination of obscene material.

It does not appear that the constitutional issue under discussion was raised in *Price* or in *Rosen* and the Court did not pass on the question in either case. It may be noted that *Rosen* approved an instruction to the Jury on the issue of obscenity, based on the Hicklin rule that this Court expressly disapproved in *Roth* v. *United States*, 354 U. S. 476 (compare 354 U. S. at 489 with 161 U. S. at 43). The Court in *Rosen* also approved a ruling subsequently disapproved in *Butler* v. *Michigan*, 352 U. S. 380 (compare 352 U. S. at 383-84 with 161 U. S. at 43). Under the circumstances neither *Rosen* nor *Price* may be held to preclude plenary consideration of the constitutional questions left undecided in *Smith* v. *California* and presented here, particularly in view of the developments during the past 10 years in the law relating to censorship of speech and press.

In the instant case, the United States Customs Bureau determined that the film "The Lovers" is "not obscene". At the time Appellant received the picture, Ohio had not made any determination contrary to that of the United States Customs Bureau (whether or not it was free to do so, see *Eureka Productions, Inc.* v. *Lehman*, 302 U. S. 634). Appellant therefore had ample reason to believe that his possession and exhibition of a film imported into this country pursuant to a federal administrative determination, was not wrongful. See *Dennis* v. *United States*, 341 U. S. 494, 500, *Smith* v. *California*, 361 U. S. 147.

Appellee's Argument with Respect to the Question (3)

Whether the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court, and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

Appellee objects to a consideration of the question on the ground that "the Ohio Supreme Court was given no opportunity to pass" on it. (Appellee's brief, p. 22). The objection may be dismissed as untenable in view of the fact that the question relates to an issue that the court did in fact pass upon and that is discussed in its opinion, see 173 Ohio St. at pp. 26-28, *Whitfield* v. *Ohio*, 297 U. S. 431, 435-436 and Appellant's Jurisdictional Statement at pp. 14-15. The question was also presented to the Ohio Supreme Court in the Appellant's brief to that court (at pp. 80-81, and 89) and as noted in the Appellee's brief on this motion to dismiss or affirm (at pp. 22-23), the question was also passed on by the Trial Court and the County Court of Appeals in this case.

In his Jurisdictional Statement (at p. 16) Appellant Jacobellis submitted that the Courts below, in judging "The Lovers" obscene according to "community standards", erred in considering only the singular standards of the local community in which Appellant was tried. The Appellee suggests that Appellant is estopped from raising that point because the evidence presented by Appellant related only to the standards prevailing in the County of Cuyahoga (Appellee's Brief pp. 11, 27-28). The record below reveals that the evidence submitted by Appellant was not limited to standards of the local community. While witnesses from

Cuyahoga County testified, their testimony was not restricted to the standards of that county.[5] The Record also shows that Appellant relied heavily on evidence of acceptance and commendation of the film by the motion picture critics of other areas, and caused the critics for The Saturday Review and the New York Herald Tribune to testify by deposition.

Appellee's Argument with Respect to the Question (4)

Whether Appellant was convicted and punished twice under Section 2905.34 for the same offense in violation of the guarantees of the Fourteenth Amendment.

Appellee argues that the indictment in this case used the phrase "on or about" November 13, 1959 and the convictions *may have been* for two separate offenses, namely possession on November 10 and exhibition on November 13 (Appellee's Brief, pp. 29-30). Though not articulated, the argument presumably is that if Appellee's construction of the indictment is accepted, there is no need to decide the federal question presented. The short answer is that the Court of Appeals below did not accept Appellee's interpretation of the indictment and decided the federal question on the merits, 175 N. E. 2d 123, 124; and it may be assumed that the affirmance of the Court of Appeals decision by the Ohio Supreme Court was also an affirmance of that disposition of the question.

---

[5] See, for example, the testimony of Dr. Richard W. Wallen, psychologist (at R. 716-19, 726-28) and of Reverend Peter H. Samson (at R. 796-98). The references are to the pages of the Bill of Exceptions included in the Record on Appeal from the Court of Common Pleas. The pagination referred to is in the upper right hand corner of each page.

Appellee's Argument with Respect to the Question (5) *Whether Section 2905.34 as modified by related statutes denies equal protection of the laws and authorizes punishment without due process of law.*

Question 5 was first presented on the argument of a demurrer to the indictment, renewed in the Trial Court, argued in the intermediate Appellate Court, included in the assignments of error to the Ohio Supreme Court, and was briefed by both parties. The issues are also "fairly comprised" in Question 3 of Appellant's Notice of Appeal herein, which includes among the questions presented the question of whether Appellant was "deprived . . . of equal protection of the laws and of due process of law . . . ".

The elaborate arguments presented at pp. 31-37 of Appellee's brief to show that the Ohio statutory scheme is not discriminatory do not require detailed rebuttal here. Suffice it to say that the Appellee's citation (at p. 36 of its brief) of *State ex rel.* v. *Thrasher*, 130 Ohio St. 343 is illustrative. Though cited for the proposition that the Ohio constitution does not preclude reasonable classification, *Thrasher* held that an excise tax discriminating in favor of certain bondholders was unreasonable and therefore void under the Ohio constitution.

Conclusion.

The motion to dismiss the appeal or in the alternative to affirm, should be denied because the appeal presents a number of substantial federal questions timely and properly raised. The judgment of the Court below should therefore be reviewed, and the issues presented should be given plenary consideration.

Respectfully submitted,

EPHRAIM LONDON,
Attorney for Appellant

August 16, 1962

On the Brief

LOUIS LASER
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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 11

NICO JACOBELLIS,
Appellant,

against

STATE OF OHIO,
Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF AMERICAN AND OHIO CIVIL LIBERTIES UNIONS AS AMICI CURIAE.

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

NICO JACOBELLIS,

Appellant,

against

STATE OF OHIO,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF AMERICAN AND OHIO CIVIL LIBERTIES UNIONS AS AMICI CURIAE.

INTEREST OF AMICI.

The American Civil Liberties Union and its Ohio affiliate, the Ohio Civil Liberties Union, are organizations dedicated to the preservation and extension of civil liberties, and particularly the freedoms protected by the Bill of Rights of the United States Constitution.

This brief of *amici curiae* is filed because it appears to us that the felony conviction of a motion picture exhibitor for showing a motion picture to the public about whose aesthetic merit responsible opinion varies widely abridges the freedom of expression guaranteed by the First and Fourteenth Amendments—both as to the right of the distributor to disseminate and the corresponding right of members of the adult public to exercise their freedom of choice in determining for themselves what forms of artistic and literary expression they will experience.

Our interest is not in the protection of smutty motion pictures, nor do we presume to judge the artistic merit of the motion picture whose exhibition caused defendant-appellant's conviction here. Neither is our concern limited to our objection to the suppression of the particular film here involved. Suppressed, in addition to the film, is the courage of this movie exhibitor and others to show the entire spectrum of artistic creativity the medium affords, upon fear of future prosecutions. And the public is thereby the loser.

It is our conviction that censorship of any form of expression is repugnant to a free society. As Mr. Justice Douglas has pointed out:[1]

> "No more potent force in defeat of * * * freedom could be designed than censorship. It is a weapon that no minority or majority group, acting through government, should be allowed to wield over any of us."

Mr. Justice Black, concurring in *Smith v. California*, 361 U. S. 147, 160 (1959), has suggested the principal reason for our concern for the outcome of this "obscenity" conviction:

> "While it is 'obscenity and indecency' before us today, the experience of mankind—both ancient and modern—shows that this type of elastic phrase can, and most likely will, be synonymous with the political and maybe with the religious unorthodoxy of tomorrow."

In the firm belief that "the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit," [2] and in the hope that it will be of some assistance to the Court in dealing with its great task

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[1] In his dissenting opinion in *Times Film Corp. v. Chicago*, 365 U. S. 667 (1961).

[2] *Kingsley Int'l Pictures Corp. v. Regents*, 360 U. S. 684, 695 (concurring opinion by Mr. Justice Frankfurter).

of preserving freedom of expression from "insidious encroachment by men of zeal, well-meaning but without understanding,"[3] this brief is filed.

The written consent of the parties to this appearance *amicus* has been obtained and filed with the Clerk of the Court.

STATEMENT OF FACTS.

The appellant, manager of the Heights Art Theater in Cleveland Heights, Ohio, was indicted and convicted by a three-judge court for separate counts of possession and exhibition of the film "The Lovers," which the court found to be an obscene motion picture within the meaning of Section 2905.34 of the Ohio Revised Code.

The holding of the trial court and the pertinent language in its opinion is set out below:

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd and lascivious within the definition, description, and test set forth in *Roth v. United States*, (June 24, 1957) 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. "Les Amants" (or The Lovers) has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, *the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest.* It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film." (Emphasis supplied.) 12a, Appendix, Plaintiff-Appellant's Jurisdictional Statement.

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[3] *Olmstead v. United States*, 277 U. S. 437, 479 (1928).

The appellant was sentenced to pay a fine of $500.00 on the possession count and $2000 on the exhibition count, a total fine of $2,500.00, and to be imprisoned until the fine was paid. Pending this appeal, sentence has been stayed.

SUMMARY OF ARGUMENT.

Inasmuch as the defendant-appellant was convicted on counts of possession and exhibition of an obscene film under the verbal formula contained in *Roth v. United States*, 354 U.S. 476 (1957), for determining what is constitutionally obscene, and therefore outside the protections of the First and Fourteenth Amendments, it is appropriate for *Amici Curiae* in urging reversal of the conviction below, to re-examine that holding. In light of the imperatives of freedom of expression and the decisions and sociological studies since the enunciation of the *Roth* rule, we urge the Court to reconsider certain aspects of that decision.

We contend that:

I. All utterances are within the protection of the First and Fourteenth Amendments and may not be punished unless there is a clear and present danger that they will bring about a substantive evil.

II. The *Roth* test of obscenity is vague and unworkable and tends to inhibit the dissemination of expression which is not obscene and clearly within the protective scope of the First and Fourteenth Amendments.

Moreover, this case squarely presents the question specifically left open in *Smith v. California*, 361 U. S. 147 (1959), as to the *kind* of knowledge of the material alleged to be obscene which a defendant must possess before an obscenity conviction is constitutionally valid, and the fur-

ther question whether a conviction for both possession and exhibition of an obscene film is double conviction for the same offense and, therefore, in violation of the due process clause of the Fourteenth Amendment.

We contend that:

III. The due process clause of the Fourteenth Amendment, as it incorporates the First Amendment, requires that the *scienter* necessary for an obscenity conviction be *knowledge of the obscene nature of the material.*

IV. The conviction of the defendant-appellant on a count of possession and control and also on a count of exhibition is double conviction for the same offense and in violation of the Fourteenth Amendment.

Each of these contentions will be discussed in sequence and in detail below.

ARGUMENT.

I. ALL UTTERANCES ARE WITHIN THE PROTECTION OF THE FIRST AND FOURTEENTH AMENDMENTS AND MAY NOT BE PUNISHED UNLESS THERE IS A CLEAR AND PRESENT DANGER THAT THEY WILL BRING ABOUT A SUBSTANTIVE EVIL.

The explicit basis for the instant conviction is the Court's holding in *Roth vs. United States*, 354 U. S. 476 (1957).[4] We respectfully urge the Court to reconsider that decision.

Roth held that obscenity was outside the area of speech and press protected by the First Amendment. It

[4] The material involved in *Roth* was so-called hard-core pornography whereas no such material is involved in the instant case. However, *Roth* has in fact been applied here by the lower courts because the opinion in *Roth* was not explicitly limited to hard-core pornography.

also held that, in order to punish for obscenity, there need not be a showing or a consideration of the issues behind the "clear and present danger" rule. We believe that these holdings open the door to federal and state intrusion into the area of speech and press beyond the point permitted by the First Amendment.

The starting point for an examination of the problems arising from the expression of opinion and utterances is, of course, in the thinking processes of the individual, in which the state can have no legitimate interest. Even the Ohio Supreme Court adopts this as a postulate. See *Ohio vs. Jacobellis*, 173 Ohio St. 22, 27 (1962); *Ohio vs. Mapp*, 170 Ohio St. 427 (1960). However, the mere formulation of opinions by individuals is meaningless unless they are allowed to express those opinions to others. It is in this area of verbal or visual expression of individual thought that the problems arise.

It is our position that obscenity, as much as any other form of speech or press, is entitled to the protection of the First Amendment. Accordingly, the question in a case involving obscenity, just as in every case involving an attempted restriction upon free speech, is whether the words or pictures are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about a substantive evil that the state has a right to prevent. See *Schenck vs. United States*, 249 U. S. 47 (1919); *Whitney vs. California*, 274 U. S. 357 (1927) (dissenting opinion). There is no evidence in the record that the motion picture involved in this case presents such a clear and present danger; in addition, we believe that, under the current state of knowledge, there is grossly insufficient evidence to show that obscenity brings about *any* substantive evil.

The clear and present danger rule, as applied to speech, has had a somewhat uneven existence since its promulgation in the *Schenck* case. The Court, in *Dennis vs. United States*, 341 U. S. 494 (1951), modified the rule substantially. After finding that, in many of the instances in which the rule had previously been applied, it had been determined that the interest the state was attempting to protect was too insubstantial to warrant restriction of speech, the Court adopted a test set forth by Judge Learned Hand, as follows:

> "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." 341 U. S. 494, 510.

It therefore appears that the present day statement of the rule is to determine the evil from which the state is to be protected,[5] determine its gravity, and then to discount the gravity of that evil by its improbability of occurrence. While we do not agree with this modification of the clear and present danger rule, we believe that obscenity does not even fall within an area of speech proscribed by the modified rule.

The question thus becomes one of first determining whether the use of obscenity presents an evil to the state. This test was stated in 1859, with perhaps a different emphasis on the particular nature of the evil that must be found, in John Stuart Mill's "Essay on Liberty." He stated:

> "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings

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[5] The evil which the Court found in *Dennis* was the serious danger of the overthrow of the government by force and violence. 347 U. S. 494, 509.

> of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. *To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else.* * * * Over himself, over his own body and mind, the individual is sovereign." (Emphasis added.)

Mill felt that the appropriate region of human liberty demanded absolute freedom of thought and feeling on all subjects, including the "* * * practical or speculative, scientific, moral, or theological," and liberty of tastes and pursuits, even though the resulting conduct might be thought "* * * foolish, perverse, or wrong." However,

> "* * * No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may

justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind * * * But * * * [T]hat mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions.

"* * *

"* * * [W]ith regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; *the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.*" (Emphasis added.)

Similarly, Judge Bok, writing in *Commonwealth vs. Gordon*, 66 Pa. D. & C. 101, affd. sub nom. *Commonwealth vs. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950), stated that an obscenity statute

"* * * may * * * be applied, in exercise of the police power, only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as a perceptible result of the publication and distribution of the writing in question: * * *" 66 Pa. D. & C. 101, 156.

The *Dennis* modification of the clear and present danger rule requires a finding of an evil, the gravity of which is such as to justify an invasion of free speech to avoid its occurrence. In *Roth* the Court stated that obscenity and libel are in the same class. It will be noted that the law of slander and libel requires *proof of harm to another* before there is an actionable wrong. 53 *C. J. S.*, § 4, Libel and Slander; 33 *Am. Jur.*, § 5, Libel and Slander. In *Beauharnais vs. Illinois*, 343 U. S. 250 (1952), the Court equated group libel with "* * * insulting or fighting words—those which by their very utterance inflict injury or tend to incite to an immediate breach of the peace" (343 U. S. 250, 256) and found a danger of group libel inciting murder, exacerbating tension, and threatening violence and destruction.

However, there is no proof in this record in the instant matter of harm resulting to another from an obscene utterance. Certainly the right of free speech protected by the First Amendment is so important that no court should merely assume, without proof, that harm will result from its exercise.

The Court did not squarely meet this problem in *Roth*. It held, in effect, that obscenity is not within the area of constitutionally protected speech, and therefore it is unnecessary that there be shown any harm to others by its utterance. We submit that this begs the question. The *only* reason advanced by the Court for holding that obscenity is not within the protection of the First Amendment is that obscenity is "* * * utterly without redeeming social importance." 354 U. S. 476, 484.

Here the Court appears not to have followed even the *Dennis* modification of the clear and present danger rule. The test used in *Roth* was not whether the words were used in such circumstances and were of such a nature as

to create a clear and present danger that they would bring about a substantive evil (*Schenck, supra*); nor was it a test based upon determining the existence of an evil, the gravity of the evil, and the improbability of its occurrence (*Dennis, supra*). Instead, the sole test adopted by the Court is whether the utterance has redeeming social importance." We submit that the Court deviated from its prior standards in First Amendment cases, and that as a result the freedom guaranteed by the First Amendment has been seriously weakened.

John Stuart Mill felt that it was not within anyone's province to determine whether any utterance might have redeeming social importance. He stated, in his "Essay on Liberty":

> "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.
>
> "* * * We can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."

" Compare *Hannegan vs. Esquire*, 327 U. S. 146, 157-158 (1946).

The inquiry therefore must return to a determination of whether obscenity involves a danger of bringing about a substantive evil, of whether some substantial important interest of the state is being violated. This requires an examination of the purpose underlying the enactment of the obscenity laws. It has been stated that such legislation is necessary because obscene material causes immoral conduct and that its suppression is necessary to the preservation of public morality.[7] See Note, Constitutional Law—The Problem with Obscenity, 11 *West Res. Law Rev.* 669, 670 (1960).

With respect to the contention that obscene material causes immoral conduct, the fact is that there are no facts—there is grossly insufficient evidence that the utterance of obscenity causes immoral conduct, the evil sought to be avoided.[8] We do not intend to belabor this point, because it has already been amply demonstrated that there is insufficient evidence that obscenity will lead to this evil.

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[7] It has also been claimed that there is a danger of obscenity's stimulating "impure" sexual thoughts. However, this alleged evil relates to the incitement of mere thoughts, not overt *acts*, and hence is not a proper basis for inhibiting free speech. See American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10(2), Comments, p. 10.

It has also been stated that obscenity must be prohibited because it offends the sensibilities and feelings of the audience. This is clearly no reason for refusing to apply the protection of the First Amendment, so long as the utterer does not have the power to compel his audience to listen to or read the obscene material. If the audience chooses voluntarily to do so, this can be no basis for punishing the utterer unless it is shown that the resulting sexual thoughts lead to overt acts which are otherwise prohibited by law. As it has been said with respect to television and radio programs: if you don't like the program, just turn the dial. See *Public Utilities Commission vs. Pollak*, 343 U. S. 451, 468-469 (1952).

[8] The Court did not rule upon this point in *Roth*, because it felt that any such determination was unnecessary in view of its ruling that obscenity is not protected speech.

See *Roth*, *supra*, footnotes 21 and 22 and 354 U. S. 476 at 510-511 and cases and studies cited in footnote 26, *infra*.

With respect to the contention that the suppression of obscenity is necessary to the preservation of public morality, we recognize that the physical acts usually connoted by the term "obscenity" are generally condemned by the very strict moral code of our society, which has dictated that such conduct must be suppressed and considered in the nature of a sin.[9] Other societies in this world do not share our conventions. We need not decide whether any societal moral code is better than any other. However, we note the comment of John Stuart Mill, who stated in his "Essay on Liberty":

> "I have said that it is important to give the freest scope possible to uncustomary things, in order that it may in time appear which of these are fit to be converted into customs. But independence of action, and disregard of custom, are not solely deserving of encouragement for the chance they afford that better modes of action, and customs more worthy of general adoption, may be struck out; * * * If it were only that people have diversities of taste, that is reason enough for not attempting to shape them all after one model. But different persons also require different conditions for their spiritual development; and can no more exist healthily in the same moral, than all the variety of plants can in the same physical, atmosphere and climate. The same things which are helps to one person towards the cultivation of his higher nature are hindrances to another. * * * Why then should tolerance, as far as the public sentiment is concerned, extend only to tastes and modes of life which extort acquiescence by the multitude of their adherents?"

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[9] Of course, the acts (or evils) which, it is alleged, may be caused by obscenity are *not* necessarily illegal; only under certain, carefully defined circumstances have they been proscribed by statute (e.g., adultery). Cf. *Kinsey, Sexual Behavior in the Human Male* (1948).

Certainly no one would deny that an individual is free to hold an opinion that a part of our sexual moral code may not be the only possible code. Let us postulate a situation in which that individual uses a vivid description of sex in an essay, novel or movie in an attempt to change the sexual mores of the audience. In other words, suppose that the author chooses to use a sexual description in a story to bring about such a change, and there is no evidence that the proposed change and the method of accomplishing it involve any violence or harm to others. Is the protection of the First Amendment to be denied the author because his ideas contravene those generally held by the society in which he writes (i.e., are deemed "immoral")? See e.g., Aldous Huxley, "Island"; George Orwell, "1984."

> "Mankind can hardly be too often reminded, that there was once a man named Socrates, between whom and the legal authorities and public opinion of his time there took place a memorable collision. * * * This acknowledged master of all the eminent thinkers who have since lived—whose fame, still growing after more than two thousand years, all but outweighs the whole remainder of the names which make his native city illustrious—was put to death by his countrymen, after a judicial conviction, for impiety and immorality. Impiety, in denying the gods recognised by the State; indeed his accuser asserted (see the 'Apologia') that he believed in no gods at all. Immorality, in being, by his doctrines and instructions, a 'corrupter of youth.' Of these charges the tribunal, there is every ground for believing, honestly found him guilty, and condemned the man who probably of all then born had deserved best of mankind to be put to death as a criminal." John Stuart Mill, "Essay on Liberty."

An author should not be punished if he chooses to expound his ideas through the use of certain materials.

> "The line between the informing and entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." *Winters vs. New York*, 333 U. S. 507, 510 (1948).

Indeed, this Court has already held that the use of such materials may not be proscribed where their use is to advocate a change in our sexual code.

> "What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The state, quite simply, has thus struck at the very heart of constitutionally protected liberty." *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*, 360 U. S. 684, 688 (1959).

Nor may the use of such materials be proscribed where their use is to advocate a change in non-sexual areas of human behavior. *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (D. C. S. D. N. Y. 1959). Obviously, reluctance or abhorrence to the change advocated, whether sexual or non-sexual in nature, does not constitute a basis for denying the use of the materials; this is "the very heart of constitutionally protected liberty." In brief, the evil for which obscenity must be suppressed—the preservation of public morality—should not be denoted an "evil" in a free, constantly changing society such as ours; in fact the use of materials to advocate a change in "public morality" should be constitutionally protected in order to prevent a far greater evil—the enforced imposition by society of conformity in thoughts and ideas.

It therefore appears that obscenity statutes violate the First and Fourteenth Amendments because there is no demonstrable connection between the evil they are intended to avoid and the means chosen to avoid that evil. There is no clear and present danger that the utterances sought to be prohibited will bring about the evil to be avoided. Based on present day evidence, the improbability of the evils resulting from the conduct suppressed is so great that no invasion of free speech is warranted. Furthermore, some of the "evils" alleged are not evils in a society which cherishes and thrives on freedom and liberty. As the Court noted in *Roth*:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the states. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." 354 U. S. 476, 488.

II. THE ROTH TEST OF OBSCENITY IS VAGUE AND UNWORKABLE AND TENDS TO INHIBIT THE DISSEMINATION OF EXPRESSION WHICH IS NOT OBSCENE AND CLEARLY WITHIN THE PROTECTIVE SCOPE OF THE FIRST AND FOURTEENTH AMENDMENTS.

It has already been argued that the holding in *Roth v. United States*, 354 U. S. 476, 485 (1957), "that obscenity is not within the area of constitutionally protected speech or press" is a drastic curtailment of First Amendment protections.

We also urge that the standards expressed by the Court in *Roth* for determining what forms of expression

are "obscene," and therefore not entitled to constitutional protection, should be re-examined because they are vague, unworkable and tend to inhibit the dissemination of constitutionally protected expression.

Obscenity, as defined in *Roth*, is "material which deals with sex in a manner appealing to prurient interest," or "material having a tendency to excite lustful thoughts." Moreover, obscenity is "utterly without redeeming social importance." 354 U. S. at 484. Rejecting the standard of *Regina v. Hicklin*, [1868] L. R. 3 Q. B. 360, this Court substituted this test:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U. S. at 489.

Thus the Court, having excepted "obscenity" from the protections of the First and Fourteenth Amendments, was faced with the task of describing the limits of the exception with sufficient particularity to insure constitutional protection for other "non-obscene" forms of expression.

That it failed, in the view of *amici*, in *Roth* and in subsequent cases, to delimit sufficiently precise boundaries for unprotected utterances demonstrates the difficulty of the assignment rather than the Court's failure to recognize the importance of its assigned task.[10]

Although *Roth* liberalized the *Hicklin* test of obscenity by requiring consideration of "the dominant theme of the material taken as a whole" and its effect upon "the average person" in lieu of judging the material "by the

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[10] "It is * * * vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth v. U. S.*, 354 U. S. at 488.

effect of an isolated excerpt upon particularly susceptible persons," [11] and although many of the subsequent decisions of this Court following *Roth* have strictly limited obscenity convictions by the lower courts,[12] the test that *Roth* substituted has created as many problems as it has solved.

Mr. Chief Justice Warren[13], and Justices Black,[14] Douglas[15] and Harlan,[16] have themselves raised serious questions as to the wisdom of the *Roth* test of obscenity.

Mr. Justice Douglas's critique of the *Roth* verbal formula in his dissenting opinion in *Roth*, in which Mr. Justice Black concurred, lays bare its inherent defectiveness as a constitutional standard:

> "Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared

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[11] *Roth v. U. S.*, 354 U. S. at 488-489.

[12] *Times Film Corp. v. City of Chicago*, 355 U. S. 35, *reversing* 244 F. 2d 432 (7th cir. 1957) (the movie, "The Game of Love," held: not obscene); *Mounce v. United States*, 355 U. S. 180, *reversing* 247 F. 2d 148 (9th cir. 1957) (an imported collection of nudist and art student publications containing many nude photographs, held: not obscene); *One, Inc. v. Olesen*, 355 U. S. 371 (1958) *reversing* 241 F. 2d 772 (9th cir. 1957) ("One—The Homosexual Magazine," held: not obscene); *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958) *reversing* 249 F. 2d 114 (D. C. Cir. 1957) ("Sunshine & Health" and "Sun Magazine," held: not obscene); cf. *Kingsley-Int'l Pictures Corp. v. Regents*, 360 U. S. 684 (1959) (the French motion picture, "Lady Chatterley's Lover," held: the statute under which conviction for exhibition of the film had been obtained violated the First Amendment's guarantee of freedom to advocate ideas); and see *Manual Enterprises, Inc. v. Day*, 370 U. S. 478 (1962) (homosexual magazines with photographs of nude or near nude male models, held: not obscene).

[13] Concurring in the result in *Roth*, 354 U. S. at 494-495.

[14] *Smith v. California*, 361 U. S. 147, 157 (1959) (concurring opinion).

[15] Dissenting in *Roth*, 354 U. S. at 512-514.

[16] Concurring in part and dissenting in part in *Roth*, 354 U. S. at 497-498.

with the First Amendment. Under the test, juries can censor, suppress, and punish what they don't like, provided the matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win. If experience in this field teaches anything, it is that 'censorship of obscenity has almost always been both irrational and indiscriminate.' * * * *The test adopted here accentuates that trend.*" (Emphasis supplied.)

* * * * *

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed."

* * * * *

"I reject too the implication that problems of freedom of speech and of the press are to be resolved by weighing against the values of free expression, the judgment of the Court that a particular form of that expression has 'no redeeming social importance.'

* * * * *

"For the test that suppresses a cheap tract today can suppress a literary gem tomorrow. All it need do is to incite a lascivious thought or arouse a lustful desire. The list of books that judges or juries can place in that category is endless." 354 U. S. at 512, 513, 514.

Nor have the text-writers been silent in their criticism of the obscenity test formulated in *Roth*.[17]

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[17] e.g. *Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); *Kalven, Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960).

While *amici* have no quarrel with *Roth* insofar as it rejects the *Hicklin* rule of judging material by isolated passages and by its effect on particularly susceptible persons,[18] the test formulated in *Roth* presents a perplexing problem of application to those who would use the pronouncements of the Court for guidance in dealing with obscenity prosecutions.

FIRST: How are the standards of sex portrayal "in a manner appealing to prurient interest" and "having a tendency to excite lustful thoughts" to be applied in concrete cases?

SECOND: Which community's "contemporary standards" are to be applied? Is this a constitutional question or an issue for the trier of fact?

THIRD: Who is the "average person" whose "prurient interest" or "lustful thoughts" need be aroused before material may be adjudged obscene? What of material designed for a special audience?

FOURTH: How is the determination that material is "utterly without redeeming social importance" to be made? Is the determination to be made by the application of literary or artistic standards or left to the determination of juries?

A. Obscenity Standards of Sex Portrayal.

Since obscenity, as defined in *Roth*, is "material which deals with sex in a manner appealing to prurient interest," [19] it is necessary to inquire what, if any, constitutional

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[18] See Judge Learned Hand's critical analysis of the defective and now-defunct *Hicklin* rule in *United States v. Kennerley*, 209 Fed. 119, 120-121 (S. C. N. Y. 1913).

[19] 354 U. S. 476, 487.

meaning "prurient interest" has. Apparently the term was appropriated from a proposed draft of the *Model Penal Code* of the American Law Institute.[20] The Institute's definition of "prurient interest" is "*shameful* or *morbid* interest in nudity, sex or excretion" [21] or "an *exacerbated, morbid,* or *perverted* interest growing out of the conflict between the universal sex drive of the individual and equally universal social controls of sexual activity." [22] (Emphasis supplied.) Are not these definitions descriptive of something other than normal sexual interest or arousal? Or did the Court intend some other meaning to be attached to the words "prurient interest"? If so, does the court equate "prurient interest" with normal sexual arousal? If not, what becomes of the "average person" whose sexual arousal determines whether or not utterances shall have constitutional protection? May an "average person" have an "*exacerbated, morbid* or *perverted*" sexual interest?

Nor is the latest pronouncement of members of this Court particularly illuminating in dealing with this problem. Although equating "prurient interest" with "impure desires relating to sex," Mr. Justice Harlan, speaking for himself and Mr. Justice Stewart, remarked:

> "* * * one would not have to travel far even among the acknowledged masterpieces in any of these fields [literature, science or art] to find works whose 'dominant theme' might, not beyond reason, be claimed to appeal to the 'prurient interest' of the reader or observer." *Manual Enterprises, Inc. v. Day,* 370 U. S. 478, 82 S. Ct. 1432, 1437 (1962).

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[20] A. L. I., Model Penal Code, Tent. Draft No. 6 (1957) § 207.10 (2): "A thing is obscene if, considered as a whole, its predominant appeal is to *prurient interest* * * *."

[21] *Ibid.*

[22] *Id.* at 29.

Moreover, since the Court in *Roth* defined obscenity not only as 'material which deals with sex in a manner appealing to prurient interest" but, in the alternative, as "material having a tendency to excite lustful thoughts," a concept expressly rejected by the American Law Institute,[23] it is not clear whether the Court intended to incorporate the *Model Penal Code* definition into its obscenity formula or whether, as Mr. Justice Harlan put it, the Court "merely assimilate[d] the various tests into one indiscriminate potpourri."[24] These ambiguities provide ample cause for concern "[b]ecause First Amendment freedoms need breathing space to survive," and therefore, "government may regulate in the area only with *narrow specificity*."[25] (Emphasis supplied.)

The studies of the behavioral sciences in this area further illuminate the difficulties involved in ascertaining a constitutionally valid meaning for "prurient interest." It is an acknowledged fact that the studies have failed to reveal a direct causal relationship between exposure to obscenity and overt anti-social conduct,[26] without more.

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[23] "* * * We reject the prevailing test of tendency to arouse lustful thoughts or desires because it is unrealistically broad for a society that plainly tolerates a great deal of erotic interest in literature, advertising and art, and because regulation of thought or desire, unconnected with overt misbehavior, raises the most acute constitutional as well as practical difficulties." A. L. I., *Model Penal Code*, Tent. Draft No. 6 (1957) § 207.10(2). Comment, p. 10.

[24] 354 U. S. at 500.

[25] *National Association for the Advancement of Colored People, etc. v. Button*, U. S. , 31 U. S. L. Week 4063, 4067 (U. S. Jan. 14, 1963).

[26] See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S. v. Roth*, 237 F. 2d 796, 804, (2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts*, 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1942);

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Of itself, "this absence of dependable information on the effect of obscene literature on human conduct should make us wary. It should put us on the side of protecting society's interest in literature, except and unless it can be said that the particular publication has an impact on action that the government can control."[27]

A most recent study by Cairns, Paul and Wishner[28] reveals useful information of a more positive nature. Using sexual arousal as a physiological phenomenon more easily measured than "prurient interest," whatever the precise meaning of the latter term may be, the findings of the authors (two behavioral psychologists and a professor of law), after an examination of the psychological abstracts and a number of human experiments, are interesting and illuminating:

"1. A significant proportion of our society is sexually aroused to some extent by some form of sex stimuli in pictures and probably in books.

2. Portrayals of female nudity and of sexual activity lead to sexual arousal in many males—adolescents as well as adults. These materials arouse females far less frequently.

3. Females, on the other hand, are more frequently sexually aroused than men by complex

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see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature. A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S. v. Roth, supra*); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution*, 38 Minn. L. Rev. 295, 387 (1954); and see *Commonwealth v. Gordon*, 66 Pa. D. & C. 101 (1949).

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[27] Douglas, J. dissenting in *Roth*, 354 U. S. 476, 511 (1957).

[28] *Cairns, Paul and Wishner, Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (May, 1962).

stimuli which portray 'romantic' or 'love' relationships and which constitute, in general, less direct sexual cues.

4. Males differ among each other in terms of preference for and response to various types of sex stimuli. Factors which account for different preferences among males for viewing sexually relevant materials include: adequacy of masculine sexual identity, strong guilt with respect to sexual behavior, physical maturity and intellectual ability.

5. The environmental circumstances under which the sex stimuli are viewed may influence the extent to which the viewers will show evidence of sexual arousal. It is not clear, however, whether the failure to observe evidence of sexual arousal is due to the fact that no arousal occurred or that the overt expression of the arousal was inhibited.

6. Exposure to certain types of sex stimuli is, for some persons, both males and females, a distinctly aversive experience. Sexual guilt appears to be an important determinant of the extent to which viewing sexually relevant material will be considered an unpleasant event."

These findings with respect to *sexual arousal*—which probably is a lesser physiological or emotional reaction than *arousal of prurient interest*—demonstrate on the basis of scientific evidence what those who have considered the social problem of obscenity for years have known: that there are so many environmental and personality variables in the arousal of lustful thoughts or prurient interest that the determination of the precise books or pictures which are universally sexually stimulating is a metaphysical quest foredoomed to failure. What is sexually arousing to males holds no prurient interest to females; what excites lustful thoughts in females has no particular sexual effect upon males and is so widespread

throughout our culture as to be impossible to eradicate by criminal prosecutions. Personality, maturity and intelligence differences and varying quantities of guilt feelings about sexual matters cause vast differences in sexual response to the same stimuli even among males. What is sexually arousing to some is disgusting to others. The environmental factors under which sexual material is seen cause significant differences in response in both males and females. As Judge Bok wisely observed, more than a decade before this study:

> "If [the individual] reads an obscene book when his sensuality is low, he will yawn over it or find that its suggestibility leads him off on quite different paths. If he reads the Mechanics' Lien Act while his sensuality is high, things will stand between him and the page that have no business there. How can anyone say that he will infallibly be affected one way or another by one book, or another? When, where, how, and why are questions that cannot be answered clearly in this field * * * in a field where even reasonable precision is utterly impossible, I trust people more than I do the law." *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 137 (1949).

One more matter of concern with regard to the "prurient interest" and "lustful thoughts" language in *Roth*: since obscenity is defined as "material that *appeals* to prurient interest" and equated with "material that has a *tendency* to excite lustful thoughts," what kind of a showing is necessary to establish that the material to be judged actually has the *effect* of arousal or excitement? Must a causal relationship be demonstrated between the publication and the pruriency, between the literature and the resultant lust, or will such "appeal" or "tendency to excite" be presumed? What standards are to be applied to determine the *appeal* and the *tendency* of the disputed ma-

terial? Or is the intention of the creator of the book or picture controlling? What of the literary pandered whose intent is vile but whose book or picture fails to achieve his evil goal?

These questions remain unanswered and are, we suspect, unanswerable.

Thus, the determination of what arouses "prurient interest" or excites "lustful thoughts" is a vast guessing game, with the constitutional right of freedom of expression and the suppression of literature and art hanging in the balance.

B. Contemporary Community Standards.

The "contemporary community standards" test in *Roth* likewise provides constitutional problems because:

1. It is too vague to inform and therefore violates due process of law by not providing an ascertainable standard of guilt.

2. It exposes the basic constitutional rights guaranteed the individual to the vagaries of public opinion in violation of the First and Fourteenth Amendments.

3. The application and administration of the standard, even if it is otherwise constitutional, may violate due process of law contrary to the Fourteenth Amendment.

These difficulties are considered in sequence below.

1. The "contemporary community standards" test is too vague to inform and therefore violates due process of law by not providing an ascertainable standard of guilt.

No survey beyond the data of common sense is required to establish that there is no one community of thought in the United States on matters of morals, politics,

economics, sociology or aesthetics. Indeed, on any particular subject of broad and controversial interest there are a multitude of communities of opinion.[29] For each of these there are subdivisions and sub-subdivisions. Even a referendum on a particular issue would do no more than clock the momentary division of view within the particular grouping.

This Court, in *Roth v. United States*, adopted "contemporary community standards" as one element in the determination of obscenity. No doubt some guidance for inferior courts was intended by the adoption with approval of the charge of the *Roth* trial court:

> "* * * you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

But the approved language leaves many aspects of the "community" definitions unresolved. Lower courts, confronted with the inescapable necessity for applying the standard, have either avoided its difficulties by ignoring them or have grappled with the issue with kaleidoscopic consequences. Although neither uniformity nor clarity has been the end product of these various efforts, the reported decisions are amenable to rough classification. Some simply recite the *Roth* definition and hold it applicable without analysis.[30] In one decision the federal district was

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[29] A few categories that come to mind readily are the geographic, age, religious, ethnic, nationality, economic, social, fraternal, professional, theatrical, educational, scientific, farming, educated and uneducated.

[30] *Ohio v. Jacobellis*, 173 Ohio St. 22, 25-26 (1962); *United States v. Keller*, 259 F. 2d 54, 57-59 (3rd Cir. 1958); *Alexander*

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apparently used to define the geographic boundaries of the "relevant" community:

> "As intended by the Congress, a jury drawn from this district will be familiar with and best able to apply the local community standards in determining whether books were obscene and in violation of the statutes."[31]

But another district court in the same state, which may have been applying a district standard, implied a *minimum* universal standard—perhaps in dictum:

> "* * * There must however, be some constancy in morality—some things which, without reference to time and place, will offend the decent instincts of any

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v. United States, 271 F. 2d 140, 145-146 (8th Cir. 1959); *Collier v. United States*, 283 F. 2d 780, 781-782 (4th Cir. 1960), cert. denied 365 U. S. 833 (1961); *United States v. Oakley*, 290 F. 2d 517, 519 (6th Cir. 1961), cert. denied 368 U. S. 388 (1961); *Ackerman v. United States*, 293 F. 2d 449, 451 (9th Cir. 1961), refusal to qualify the *Roth* standard so as to make it inapplicable to non-commercial private correspondence; *Womack v. United States*, 294 F. 2d 204, 205-206 (D. C. Cir. 1961), cert. denied 365 U. S. 859 (1961); in *Sunshine Book Co. et al. v. Summerfield*, 249 F. 2d 114, 118 (D. C. Cir. 1957), the court quoted the *Roth* test and held the trial judge correctly applied it. In so doing, however, it appears that the trial judge affirmed a finding by the Post Office Solicitor that the offending photos were "obscene and indecent when judged by the ordinary community standards of the vast majority of citizens of this country * * *" p. 115, reversed 355 U. S. 372 (1958); *Poss v. Christenberry*, 179 F. Supp. 411, 415 (S. D. N. Y. 1959); *Zenith International Film Corp. v. Chicago*, 291 F. 2d 785, 789 (7th Cir. 1961); *Kahm v. United States*, 300 F. 2d 78, 82-84 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962).

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[31] *United States v. West Coast News Co.*, 30 F. R. D. 13, 19 (W. D. Mich. 1962); cf. *United States v. Frew*, 187 F. Supp. 500, 506 (E. D. Mich. 1960); but see *Mounce v. United States*, 247 F. 2d 148 (9th Cir. 1957), in which the court applied the standard of the community where the material "circulated," *vacated and remanded*, 355 U. S. 180 (1957) and *Lerner v. State*, 81 N. E. 2d 282 (1948). In *Lerner*, long before *Roth*, an Ohio Common Pleas Court thought the "moral concepts of the people of this state, as to what is obscene literature, is the only test allowable."

community however prudish or however sophisticated." [32]

A minority of this Court has indicated that the community of the *Roth* standard ought to be national, at least in interpreting a federal statute:

> "There must first be decided the relevant 'community' in terms of whose standards of decency the issue must be judged. We think that the proper test under this federal statute, [Title 18 USC § 1461] reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency." [33] (Brackets supplied.)

Other cases meld "average person" and "contemporary community standards" themes into one test.[34] In still others the "aggregate" sense of the community may be ignored, and, it seems, the contemporary standards of the

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[32] *United States v. Frew*, *supra*, p. 506. Cf. *Columbia Pictures Corp. v. Chicago*, 184 F. Supp. 817, 818 (N. D. Ill. 1959), where the motion picture "Anatomy of a Murder" was found not obscene or immoral and neither the word "rape" nor "contraceptive" offended the "common conscience of the general public."

[33] *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 82 S. Ct. 1432, 1437 (1962), but see Harlan, J., dissenting in *Roth v. United States*, *supra*, pp. 505-506. Cf. *Klaw v. Schaffer*, 151 F. Supp. 534, 538 (S. D. N. Y., 1957), where a national standard was applied. The test being the effect on "* * * the normal average male, offending the present and prevailing standards of decency, modesty and morality *of the country*." (Emphasis supplied.) Aff. 251 F. 2d 615 (1958), remanded with instructions to dismiss, 357 U. S. 346 (1958). Query, whether the omission of reference to females is of significance in that it implies a double standard. See also *Flying Eagle Publications, Inc. v. United States*, 273 F. 2d 799, 803 (1st Cir. 1960), in which the problem of many communities with differing standards was discussed but the test applied obscure.

[34] *Big Table, Inc. v. Schroeder*, 186 F. Supp. 254, fn. 2 at p. 256 (N. D. Ill. 1960); *Mounce v. United States*, *supra*; *Flying Eagle Publications, Inc. v. United States*, *supra*, p. 804.

homosexual community substituted where the material is aimed at the latter.[35] In the same spirit are those cases which apply the test of probable prurient interests appeal in the community of those likely to be reached.[36]

Clearly any test that selects a *part* of the community as the critical segment for gauging the contemporary standards defies *Roth v. United States*[37] and steps backward toward *Hicklin*.[38]

Some of the variations in phrasing the community standard might be considered relatively unimportant, simply expressing the same idea in different words. But mere verbal differences are confusing[39] nonetheless and other discrepancies such as those between local or national communities and the whole or a segment of the relevant community are real enough and confusing as well.

Mr. Justice Frankfurter implicitly (albeit unintentionally) condemned the ephemeral and therefore vague qualities of the test when he said:

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[35] Cf. *Klaw v. Schaffer, supra*, pp. 533-539, materials tending to stir the lust of a sex deviate is non-mailable; see also *Manual Enterprises, Inc., et al. v. Day*, 289 F. 2d 455, 456 (D. C. Cir. 1961), *reversed* 370 U. S. 478 (1962).

[36] *United States v. 31 Photographs*, 156 F. Supp. 350, 354-355 (D. C. S. D. N. Y. 1957) (Forfeiture of materials being imported by Institute for Sex Research, Inc., at Indiana University denied).

[37] *Supra*, at p. 490 where the charge approved by this Court specifically proscribed the "particular segment" measure. Cf. *Butler v. Michigan*, 352 U. S. 380 (1957).

[38] *Regina v. Hicklin*, L. R. 3 Q. B. 360 (1868). I.e., one aspect of the *Hicklin* test is the effect upon particularly susceptible persons. *United States v. 31 Photographs, supra*, adopts a platonic standard and is the reverse of the *Hicklin* measure.

[39] The confusion in verbiage may originate in part with the charge approved in *Roth*. That charge, recited in parts relevant to this point at 354 U. S. 490, includes the phrases: "average person in the community," "present-day standards of the community" and the "common conscience of the community by present-day standards."

"Can it be doubted that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859? * * * Changes in the intellectual and moral climate of society * * * afford shifting foundations for the attribution. * * *"[40]

One need not stretch a hundred years for a "shift" in standards, nor indeed for a hundred minutes, if the switch is from place to place.[41] Whether there are significant differences or not in the phrases "contemporary community standards," "average person in the community," "common conscience of the community by present day standards," "common conscience of the general public" or any other form of words for a comparable idea, the perceptive remarks of Judge Frank have an increasingly obvious contemporary relevance:

"If we accept as correct the generally current judicial standard of obscenity—the 'average conscience of the time'—that standard still remains markedly uncertain as a guide to judges or jurors—and therefore to a citizen who contemplates mailing a book or picture. To be sure, we trust juries to use their common sense in applying the 'reasonable man' standard in prosecutions for criminal negligence (or the like); a man has to take his chances on a jury verdict in such a case, with no certainty that a jury will not convict him although another jury may acquit an-

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[40] *Smith v. California, supra*, 165-166. Justice Frankfurter was explaining that "contemporary community standards" did not depend upon the idiosyncratic experience of judge or juror.

[41] Cf. "We need not decide whether Congress could constitutionally prescribe a lesser geographical framework for judging this issue which would not have the intolerable consequence of denying some sections of the county access to material there deemed acceptable, which in others might be considered offensive to prevailing community standards of decency." Mr. Justice Harlan speaking for himself and Mr. Justice Stewart in *Manual Enterprises, Inc. v. Day, supra*, p. 1437.

other man on the same evidence. But that standard has nothing remotely resembling the looseness of the 'obscenity' standard."

"There is a stronger argument against the analogy of the 'reasonable man' test: Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment." [42]

2. The "community" standard exposes the basic constitutional rights guaranteed the individual to the vagaries of public opinion in violation of the First and Fourteenth Amendments.

But even if the community test survives the charge of unconstitutional cloudiness, it cannot, by simple certitude, surmount the charge of unreasonable regulation.

The blunt language of dissent in this court has stated the rationale for the proposition of this section. We cannot improve it: [43]

"* * * the trial judge in the *Roth* case charged the jury in the alternative that the federal obscenity statute outlaws literature dealing with sex which offends 'the common conscience of the community.' That standard is, in my view, more inimical still to freedom of expression.

"The standard of what offends 'the common conscience of the community' conflicts, in my judgment, with the command of the First Amendment that 'Congress shall make no law * * * abridging the freedom of speech, or of the press.' Certainly that standard would not be an acceptable one if religion, economics, politics or philosophy were involved. How does it become a constitutional standard when literature treating with sex is concerned?

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[42] *U. S. v. Roth*, 237 F. 2d 796, 826-827 (2nd Cir., 1956), Frank concurring.

[43] *Roth v. United States*, 354 U. S. 476, 511-513. (Douglas, J.)

"Any test that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment. Under that test, jurors can censor, suppress, and punish what they don't like, provided that matter relates to 'sexual impurity' or has a tendency 'to excite lustful thoughts.' This is community censorship in one of its worst forms. It creates a regime where in the battle between the literati and the Philistines, the Philistines are certain to win."

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"I can understand (and at times even sympathize) with programs of civic groups and church groups to protect and defend the existing moral standards of the community. I can understand the motives of the Anthony Comstocks who would impose Victorian standards on the community. When speech alone is involved, I do not think that government, consistently with the First Amendment, can become the sponsor of any of these movements. I do not think that government, consistently with the First Amendment, can throw its weight behind one school or another. Government should be concerned with antisocial conduct, not with utterances. Thus, if the First Amendment guarantee of freedom of speech and press is to mean anything in this field, it must allow protests even against the moral code that the standard of the day sets for the community. In other words, literature should not be suppressed merely because it offends the moral code of the censor.

"The legality of a publication in this country should never be allowed to turn either on the purity of thought which it instills in the mind of the reader or on the degree to which it offends the community conscience. By either test the role of the censor is exalted, and society's values in literary freedom are sacrificed."

3. The application and administration of the standard, even if it is otherwise constitutional, may violate due process[44] of law contrary to the Fourteenth Amendment.

Further complications calculated to confuse the regulated arise from the diversities of view in the lower courts on the admissibility of proof establishing the community standard. Apart from the effect the proof of such standards may have on *scienter*,[45] the same evidence may be highly important in determining the *fact* of obscenity.

Mr. Justice Frankfurter has asserted constitutional status for expert evidence of community standards:

> "Unless we disbelieve that the literary, psychological or moral standards of a community can be made fruitful and illuminating subjects of inquiry by those who give their life to such inquiries, it was violative of 'due process' to exclude the constitutionally relevant evidence proffered in this case." [46]

But Mr. Justice Harlan thought a state might provide, following its traditional doctrines of evidence, that community standards not be a subject of expert testimony.[47]

There are other means of proof. These, too, are controversial and the lower courts have held both ways with respect to admissibility. For example, the trial court in *Klaw v. Schaffer*, *supra*, excluded proofs offered by the complainant:

> "The plaintiff complains that a number of exhibits, which were marked for identification, consti-

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[44] The cases discussed below are principally cases arising in the federal jurisdiction. However, the problems posed are due process problems grounded in the application of the contemporary community standards test and the issues raised admit no distinction based simply upon the duality between federal and state law.

[45] See *Smith v. California*, *supra*.

[46] *Id.*, p. 166.

[47] *Id.*, p. 172.

tuting erotic displays at least as brazen as his photographs, were excluded by the Hearing Examiner. If these exhibits were offered in proof of a community standard, it was unnecessary to receive them. The finder of fact in an obscenity issue is no more required to consider proof of moral standards of a community than is a jury in a negligence case required to consider proof of the standard of due care. The issue of fact to be tried is whether the material in question is obscene under the standard laid down by the law, and the standard itself is not in issue."[48] 151 F. Supp. 534 at 540.

To the contrary on the admissibility issue are *Poss v. Christenberry, supra; Grove Press, Inc. v. Christenberry.*[49]

The Fifth Circuit has held recently that proof of contemporary community standards by the government is not essential to a prima facie case.[50] The rule implies that prosecution may convict without proof. Such implications raise patent problems of due process.

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[48] For a compelling rebuttal of the analogy to the reasonable man test see Frank, J., concurring in *United States v. Roth*, 237 F. 2d 796, 826-827 (2nd Cir. 1956).

[49] 175 F. Supp. 488, 502 (S. D. N. Y. 1959), *aff'd* 276 F. 2d 433 (2d Cir. 1960); see *Zenith International Film Corp. v. Chicago*, 291 F. 2d 785, 789 (7th Cir. 1961), but cf. *Big Table, Inc. v. Schroeder, supra*, p. 261, where it was said that absent a contrary showing it must be held that the official who functions as a trier of the facts has applied the contemporary standards as an average member of the community. In *Womack v. United States*, 294 F. 2d 204, 206 (D. C. Cir. 1961), a customary pre-requisite to the use of expert psychiatric and psychological testimony, i.e., proof of qualification, was avowed but the Court went on to say that the introduction of commercial magazines displaying nudes was of no importance. If the cloth, said the Court, is "bright red" and in evidence, then no testimony is admissible, whether lay or expert, to show the "cloth is blue." Presumably the aim of the proffered evidence was not to change colors but only to show what was popular that season.

[50] *Kahm v. United States*, 300 F. 2d 78, 84-85 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962).

The obvious conclusion is *not* that guidance from this court is needed to firm up the concept and understanding of community standards for the benefit of the lower courts to the end that constitutional levels of certainty may be attained. On the contrary, the conclusion ought to be that the test is inherently impossible of constitutional delineation and therefore should be abandoned in favor of including all forms of expression, including obscenity, within the protections and limitations of the First and Fourteenth Amendments.

C. The "Average Person."

While the substitution in *Roth* of "the average person" for "particularly susceptible persons" as the subject whose sexual arousal is the litmus of obscenity represents a logical liberalization of the *Hicklin* rule, this portion of the *Roth* obscenity test presents monumental problems as well.

Although it is now clear that neither what can safely be shown to children[52] nor to the emotionally unstable among us[53] provides an acceptable constitutional standard for censorship of obscenity, the positive determination of who is "the average person" to which *Roth* refers has few guidelines. He has been identified as the counterpart, in the law of obscenity, of the "reasonable man" in the law of torts.[54] But the delineation of the conduct of a "reasonable man" in negligence suits does not determine whether

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[51] See *Winters v. New York*, 333 U. S. 507, 515-516, 520 (1948).

[52] *Butler v. Michigan*, 352 U. S. 380 (1957).

[53] *Roth v. U. S.*, 354 U. S. 476 at 488-489.

[54] *U. S. v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S. D. N. Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934). Cf. Judge Frank's critique of the "reasonable man" test in *U. S. v. Roth*, 237 F. 2d 796, 826-827 (2d Cir. 1956) (concurring opinion).

basic constitutional protections are to be granted or withheld, as in the area of obscenity censorship. And the analogy further breaks down when one considers that, since the vast majority of people neither know nor care about literary or artistic qualities,[55] the standard of the composite fiction of "the average person" will include multitudes who were never intended to be the audience for the particular tract or motion picture in question and who, but for the publicity resulting from the obscenity prosecution, would never have experienced it. Moreover, one may well ask: Is the "average person" composite to be drawn from the 95% of the total male population who would be convicted if the sex laws now on the books were strictly enforced?[56]

Is a tract designed for a special audience to be judged by the standard of "the average person" outside the group?[57]

What of foreign movies imported, as here, to be shown in "art" motion picture houses? Is it the "average" art theater patron whose prurient interest is in issue in this context?

Moreover, if the test of obscenity is to turn upon the nature of the audience which is exposed to it, would it not be curious to find that the publicity surrounding an obscenity prosecution could, by calling the attention of the prurient-minded public to it, change the composition

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[55] *Commonwealth v. Isenstadt*, 318 Mass. 543, 553, 62 N. E. 2d 840, 846 (1945).

[56] *Kinsey, Sexual Behavior in the Human Male* (1948), at 217 et seq.; *Report of the Committee on Forensic Psychiatry*, Group for the Advancement of Psychiatry (No. 9, Rev. 1950); Kronhausen, *Pornography and the Law* (1959), at 155 et seq.

[57] *Cf. Manual Enterprises, Inc. et al. v. Day*, 370 U. S. 478, 82 S. Ct. 1432, 1434 (1962).

and size of the audience so as to render material obscene which at the outset of the prosecution clearly was not?

The concept of "the average person" distintegrates completely as a valid test when it is applied to what has been described as "hard core" pornography.[58] It has been widely noted that "'hard core' pornography, far from having appeal to normal or 'average' persons, is disgusting to them; it seems to appeal only to the sexually inadequate: 'the frightened, the impotent, the bored and sated, the senile * * * the adolescent * * * not yet old enough to seek sexual partners or * * * [the person who] has lost the precious power of spontaneous sexual feeling.'"[59]

Thus, even assuming a case dealing with "hard core" pornography, the "appeal to the average person's prurient interest" test is entirely useless because pornography is "appealing" only to the decidedly "non-average" individual and is repulsive to "the average person" in the standard.

D. Determining What is "Utterly Without Redeeming Social Importance."

In *Roth* the Court described obscenity which was not constitutionally protected as "utterly without redeeming social importance." Presumably the Court has embarked upon the project of determining which books and pictures

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[58] Brief for the United States, pp. 37-39 in *Roth v. U. S.* *op. cit.*

[59] Margaret Mead, *Sex and Censorship in Contemporary Society*, New World Writings (Third Mentor Selection 1953) at pp. 18-19; and see D. H. Lawrence, *Pornography and Obscenity in Sex Literature and Censorship* 74-77 (1953): "[Pornographic books] are either so ugly they make you ill, or so fatuous you can't imagine anybody but a cretin or a moron reading them, or writing them."

have any social importance, at least as to those which might otherwise be obscene. We suggest, as did Mill, that "the usefulness of an opinion is itself matter of opinion: as disputable, as open to discussion, and requiring discussion as much as the opinion itself."[60]

Although the "social importance" standard was undoubtedly designed by this Court to protect expression which might otherwise be obscene, the judicial exploration of the social value of books or pictures as a factor in determining whether or not they should be suppressed is an imposing task which has dangerous implications to freedom of expression. As Mr. Justice Douglas has pointed out:

> "The First Amendment * * * was designed to preclude courts as well as legislatures from weighing the values of speech against silence." *Roth v. U. S.*, 354 U. S. at 514 (dissent).

Or, to say it another way in the language of the Court, the "redeeming social importance" justifying the dissemination of all forms of expression, if not found in the work itself, is found in the fabric of freedom woven by its uncensored use.

Amici have attempted to demonstrate some of the areas of obscurity, difficulty and logical barrenness which arise in specific applications of the rule in *Roth* as a result of the refusal to apply the "clear and present danger" test in the obscenity area. We believe, as does Mr. Justice Harlan[61] that "it is no answer to say * * * that obscenity is not protected speech." Where matters of expression are involved, a failure to define precisely, accurately and with

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[60] John S. Mill, *Essay on Liberty*.

[61] *Roth v. U. S.*, 354 U. S. at 507 (concurring in part and dissenting in part).

predictability the items which may be censored, cannot fail "to impose a severe limitation on the public's access to constitutionally protected matter," [62] both by misinterpretation of the stated tests by the lower courts and by the extrajudicial pressures of threatened prosecutions, [63] "under dangers which are hazarded only by heroes." [64]

In the view of *amici*, the attempt in *Roth* to differentiate between utterances which are constitutionally protected and those which are not, has been unsuccessful for vagueness, unworkability and, most important, the setting of standards to test expression which carry dangerous implications for the "fullest possible opportunity for the free play of the human mind." [65]

In view of this unsuccessful experiment in imposing substantive limits upon freedom of expression, there is even more validity to these words of Mr. Justice Douglas and Mr. Justice Brandeis now than at the time they were originally uttered:

> "* * * free speech is the rule, not the exception. The restraint to be constitutional must be based on more than fear, on more than passionate opposition against speech, on more than a revolted dislike for its contents. There must be some immediate injury to society that is likely if speech is allowed.
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> "The classic statement of these conditions was made by Mr. Justice Brandeis in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 376-377.

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[62] *Smith v. California*, 361 U. S. 147, 153 (1959).

[63] E.g. *New American Library v. Allen*, 114 F. Supp. 823 (N. D. Ohio 1953); *American Mercury, Inc. v. Chase*, 13 F. 2d 224, 225 (D. C. Cir. 1926); *Bantam Books Inc. v. Melko*, 25 N. J. Super. 292, 96 A. 2d 47 (1950).

[64] *Dennis v. U. S.*, 341 U. S. 494, 550 (1951) (Frankfurter, J., concurring).

[65] *Dennis v. U. S.*, *supra*, at 550 (Frankfurter, J., concurring).

"'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.

* * * * *

"'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" [66]

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AS IT INCORPORATES THE FIRST AMENDMENT, REQUIRES THAT THE SCIENTER NECESSARY FOR AN OBSCENITY CONVICTION BE KNOWLEDGE OF THE OBSCENE NATURE OF THE MATERIAL.

This Court has firmly established the principle that motion pictures as such come within the protection afforded speech and the press by the First Amendment [67] and that the due process clause of the Fourteenth Amend-

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[66] *Dennis v. U. S., supra, at* 585 (Douglas, J., dissenting).

[67] *Mutual Film Corporation v. Industrial Commission*, 236 U. S. 230 (1915); *Burstyn, Inc. v. Wilson*, 343 U. S. 495 (1952).

ment incorporates within it the protections of the First Amendment.[68] Accordingly, state criminal convictions for the exhibition of allegedly obscene motion picture films [69] must satisfy or circumvent the requirements of the First Amendment.

In *Smith v. California*, 361 U. S. 147 (1959) the Court held that the element of *scienter* is an absolute prerequisite of a conviction of distributing obscene material. There the Court was dealing with a city ordinance which required no element of *scienter* whatever and which was construed by the state courts as creating absolute criminal liability for mere possession of material later judicially determined to be obscene. Thus, the Court was able to fully satisfy its function of deciding only the case before it by declaring the ordinance unconstitutional for failure to require *any scienter* at all on the part of the accused. The Court expressly left open the question of what kind of *scienter* is necessary for a conviction under obscenity legislation. Justice Frankfurter noted in his concurring opinion:

> "How much or how little awareness that a book may be found to be obscene suffices to establish *scienter* or what kind of evidence may satisfy the how much or how little, the Court leaves for another day." 361 U. S. at 161.

"Another day" has now arrived. *Amici* submit that the heritage of freedom of this nation, the experience in the instant case, and the interpretation of the First Amendment by this Court all argue strongly for this rule:

> *To satisfy the requirement of scienter in a prosecution for disseminating obscene material, it must be*

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[68] *Gitlow v. New York*, 268 U. S. 652 (1925).

[69] We do not consider whether in fact the motion picture "The Lovers" is an obscene film. However, it is assumed *arguendo* in this portion of the brief that the film is actually what might be termed an "obscene" motion picture, to spotlight the defectiveness of the finding of *scienter* here.

proved that the accused knew or should have known of the obscene nature of the material involved.

It is true that this Court expressly reserved judgment "on what sort of mental element is requisite to a constitutionally permissible prosecution," but there are clear indications in the *Smith* decision itself that the quantum of knowledge which the Court had in mind contemplated a degree of *scienter* which included some form of knowledge, either actual or constructive, of the *obscene nature* of the material in question, not merely bare knowledge of the *contents*.

In the very passage in which it reserves judgment on the point, the Court suggests the question "whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse." *Id.* at page 212. This Court is obviously concerned with knowledge of whether the "contents in fact constituted obscenity."

Earlier in its opinion, the Court states that:

> "Very much to the point here, where the question is the elimination of the mental element in an offense, is this Court's holding in *Wieman vs. Updegraff*, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215. There an oath as to past freedom from membership in subversive organizations, exacted by a State as a qualification for public employment, was held to violate the Constitution in that it made no distinction between members who had, and those who had not, known of the organization's character." *Id.* at page 210.

The distinction drawn in the offending statute in *Wieman* was not between persons who knew merely the *identity* of the organization, and those who did not, but between those who knew its *character* and those who did not.

Mr. Justice Frankfurter, in one of four concurring opinions, summarized the Court's disposition of the case by saying that the Court held that the "liberty protected

by the Due Process Clause of the Fourteenth Amendment precludes a State from making the dissemination of obscene books an offense merely because a book in a bookshop is found to be obscene without some proof of the bookseller's *knowledge touching the obscenity of its contents.* * * * The Court accepts the settled principle of constitutional law that traffic in obscene literature may be outlawed as a crime. But it holds that one cannot be made amenable to such criminal outlawry unless he is chargeable with *knowledge of the obscenity.*" *Id.* at page 215. (Emphasis added.)

Mr. Justice Harlan took a similar view of the meaning of the Court's decision:

> "Proof of *scienter* may entail no great burden in the case of obviously obscene material; *it may, however, become very difficult where the character of the material is more debatable.*" *Id.* at page 220. (Emphasis added.)

In this context it is clear that *scienter* refers to more than simple knowledge of the contents. For if the only requirement were proof of the knowledge of the contents, the character of the material (as being clearly obscene or "more debatable") would have no bearing on the difficulty of proof. It is only if the guilt requires knowledge of obscenity that it is easier to prove knowledge in the case of "obviously obscene material" than in the case of material the character of which is "more debatable."

Thus, whatever refinements of the kind of *scienter* necessary to a constitutional conviction this Court left "for another day," it is clear that they must at least include knowledge of facts which compel a judgment that the material is obscene, rather than mere knowledge of the contents of the questioned material alone.

In *Smith* this Court recognized that a state may, in the exercise of its police power, create criminal liability without the element of *scienter*, but added that this power is subject to the most unyielding restriction in situations where freedom of expression might be impaired. The Court stated at 361 U. S. 151:

> "* * * but where we conceived that this device [of dispensing with the element of *scienter*] was being applied in a manner *tending to cause even a self-imposed restriction* of free expression we struck down its application." (Emphasis supplied.)

And again at page 155 of the *Smith* case the Court repeated:

> "It is plain to us that the ordinance in question, though aimed at obscene matter, has such a *tendency to inhibit constitutionally protected expression* that it cannot stand under the constitution."

The Court's grave concern with that which only *tends* to inhibit free expression and that which only *tends to* cause self-imposed restrictions on free expression cannot be washed away in obscenity cases by a simple requirement that the accused know only the contents of the material involved. Such a rule of *scienter* would be as great a deterrent to free expression as no *scienter* requirement at all. Under such a rule, the disseminator of ideas would be criminally liable regardless of his judgment, regardless of the circumstances and factors existing at the time he made his judgment, and regardless of the complexity of the problem of making a judgment. He would guess wrong at his peril; it is a simple matter to predict that he would soon put himself in a position where he would never have to guess again—by cutting a wide swath around all questionable forms of expression.

This Court has made similar pronouncements in *Speiser v. Randall*, 357 U. S. 513 (1958) and *Wieman v. Updegraff*, 344 U. S. 183 (1952). Indeed, *Wieman* is precedent for the adoption of the *scienter* rule here proposed. In that case, this Court had before it a statute in which membership in subversive organizations was a bar to public employment. The statute was declared unconstitutional because of its failure to require that the member of the organization have knowledge of the subversive character of the group. The Court stated:

> "To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources." (344 U. S. 183, 191.)

The facts in the case at bar are at least as compelling as those in the *Wieman* case, which required knowledge of the *nature*, not the *fact*, of the association there involved. Whereas, in *Wieman*, the by-product of an inadequate *scienter* requirement would have resulted in impairment of the right of political association, here the requirement of a lesser standard of knowledge would result in suppression of the free flow of ideas. If infringement of one basic First Amendment right justifies a strict *scienter* requirement for a constitutionally valid conviction, there is no reason why the danger to another freedom stemming from the same source (freedom of expression) should not require a similar result.

Since its statements on the *scienter* test in the *Smith* case, this Court in *Manual Enterprises, Inc. et al. v. Day*, 370 U. S. 478 (1962) again saw fit to comment on the *obscenity scienter* rule without being faced directly with the question as it is presented here.

In the *Manual Enterprises* case, an injunction action was brought by publishers of magazines held to be nonmailable by the Postmaster General because they con-

tained obscene matter and because they contained advertisements indicating where obscene matter could be obtained. That portion of the opinion dealing with the advertisement is instructive here. The opinion notes that the advertisers were found to possess photographs which "undoubtedly" may be regarded as "hard core" pornography. The Court went on to say that *scienter* was a necessary element of the wrongful act on the part of the publisher, but that the scope of *scienter* which is constitutionally adequate had not been fully decided in the *Smith* case. Mr. Justice Harlan and Mr. Justice Stewart in *Manual Enterprises* then took an important step toward deciding that question. They found the element of *scienter* lacking:

> "He [publisher's president] thus was afforded no opportunity *to judge for himself* as to its alleged obscenity." (Emphasis supplied.) (82 S. Ct. 1440.)

The publisher there did not examine the literature of his advertiser. Thus, these members of the Court might have held there to be a lack of *scienter* because of failure to merely know the *contents* of the material. Instead, they noted significantly that the publisher did not have an opportunity to "*judge* for himself *as to its alleged obscenity*."

It will perhaps be argued by those opposing a *scienter* rule requiring knowledge of the *obscenity* that such a rule renders it impossible to secure a conviction.

This argument has already been anticipated and met by the Court. In *Smith*, at 361 U. S. 154 the Court remarked that "* * * it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind." Justice Harlan in his opinion in the *Smith* case at 361 U. S. 170, in which he concurred in part and dissented in part from the Court's opinion, noted that the "hard core" area was another in which the problem could

be easily met. He stated there that "proof of *scienter* may entail no great burden in the case of obviously obscene material." But, one might ask, if the *scienter* required is knowledge of obscenity, how can the State ever obtain the first conviction with reference to any particular work of literary or motion picture art? Proof of the required knowledge will not always necessitate a prior conviction and knowledge thereof. The first defendant can be convicted if the work is in fact found to be obscene and if the prosecution can prove that the defendant knew or should have known that it was obscene. Upon what proof may a jury so find? It may consider any or all of several factors:

(1) If the material in fact is in the class generally known as "hard core" pornography, i.e. if it is so clearly obscene that it would be almost universally so adjudged;

(2) if it has in fact been universally or nearly universally so adjudged, by reputable critics, or

(3) if, although there have been no convictions in connection with the particular work, there have been convictions *of which the accused had actual knowledge* in connection with work so similar in character as to give warning to defendant that the work in question might also be found obscene.

On the other hand, in the absence of these circumstances, defendant cannot be found to have had knowledge of the obscenity, even though he might have had specific knowledge of the work's contents, if he had concluded, in good faith, that it was not obscene.

If this test results in the acquittal of some guilty persons, this is a risk which a free society must take in order to preserve the freedom of thought and expression which it guarantees its citizens.

The Ohio courts in this case failed to apply the *scienter* test requiring knowledge of the obscenity. That knowl-

edge, the evidence overwhelmingly demonstrates, defendant-appellant did not have.

It has been noted above that the Court in the *Smith* case remarked that it was indicating only that *scienter* was required and leaving to another appropriate case the determination of the kind of *scienter* needed for an obscenity conviction. This case squarely presents appropriate occasion for clarifying the *scienter* rule.

A brief discussion of the *scienter* test applied by the Ohio Supreme Court is, therefore, in order. In *State v. Jacobellis*, 173 Ohio St. 22 (1962), the court ruled that mere knowledge of the *contents* of the film is sufficient and thus upheld the conviction. The court gave lip service to the desired rule that knowledge of the *obscenity* is required when it stated that "* * * such knowledge must necessarily relate to the knowledge of the obscenity of the contents * * *," at 173 Ohio St. 25. However, a closer look at the opinion and facts leaves no doubt that the Ohio court applied a "knowledge of contents only" test. The infinitely complex questions of regulation of obscenity, and its relationship to free expression which have so troubled this Court and all other thoughtful minds presented no problem at all to the Ohio Court. In cavalier fashion, the question of obscenity was dismissed:

> "There is no real or actual ambiguity in the phrase [*Roth* definition of obscenity]. No undue burden is placed on the possessor of such literature, for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards. * * *" 173 Ohio St. 25-26 (bracketed material supplied).

The flavor of the Ohio court's approach to the question is also well displayed by that court's introduction of a

new restriction on the right to constitutional protections. The court said:

> "The producers, distributors and exhibitors evidenced so little responsibility in connection therewith, that *they have no right to assert constitutional guaranties* which require a high degree of responsibility from those who seek their protection." (Emphasis supplied.) 173 Ohio St. 28.

Suspiciously akin to the argument that guilty men are not entitled to due process of law (the underlying precept of mob rule), this language violates such basic principles of constitutional law as to require instructive comment by this Court.

Indeed, the Ohio court did not even require that the defendant know the contents of the film. It stated at 173 Ohio St. 26-27 that, "* * * where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene * * *" then the possessor should not exhibit them.

But the court gave no clue as to the application of this novel test to the facts of the instant case. It merely said:

> "The third and fourth [assignments of error] emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion." 173 Ohio St. at 24.

This promise was fulfilled only as follows:

> "The third and fourth assignments of errors raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums." *Id.* at 28.

The undisputed facts of this case overwhelmingly demonstrate the State's failure to prove the constitutionally required element of *scienter* requiring knowledge of obscene contents.

1. This film was not shown anywhere in the Greater Cleveland community prior to its showing by defendant.
2. There was no pending litigation involving this film at the time defendant was arrested.
3. This foreign film was admitted by the Bureau of Customs of the United States Treasury Department which made the express ruling that the film was not obscene.
4. The film received favorable critical acclaim from reviewers in many highly regarded publications, including, but not limited to, the following:
   a. Saturday Review of Literature.
   b. New York Times.
   c. New York Herald-Tribune.
5. The film won a second prize award at the Venice International Film Festival of 1958.
6. The film received honors at a South American Film Festival.
7. Defendant was aware of all these facts at the time of his arrest.

The prosecution has elaborately set forth in the appendix of its motion to dismiss various newspaper advertisements of the film in question, apparently to demonstrate the obscene knowledge of the defendant-appellant at the time of exhibition. That the advertisements suggest that the movie in question portrays sexual subject matter realistically is self-evident. But, as this Court has pointed out in *Roth*:

> "* * * sex and obscenity are not synonymous. * * * Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." 354 U. S. 476, 487.

Recognizing the tendency of advertisers of all commodities for sale in our society (movie exhibitors included) to take advantage of this "great and mysterious motive force in human life," in their ads, it appears to us that to find the requisite obscene knowledge of the exhibitor in an advertisement accepted for publication by a family newspaper would obliterate the constitutional requirement of *scienter* altogether.

The Ohio Supreme Court not only failed to look to the defendant's knowledge of obscenity, but erred to an even greater degree. It stated that defendant should have known this movie was obscene because this was general knowledge in the community:

> "* * * neither, however, can he profess ignorance of that *which has become general knowledge in the community*. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge *and are generally known to be obscene* as judged by the above test, then the duty devolves * * * to refrain from exhibiting * * *." 173 Ohio St. 26-27. (Emphasis supplied.)

This opinion of the Ohio court demonstrates, to say the least, a lack of understanding of the *scienter* requirement for obscenity convictions. It and other inferior federal and state courts need guidance in determining the quality of *scienter* which is constitutionally necessary. By any constitutional standard, no obscene knowledge has been shown in the record here.

The clear effect of this conviction upon a finding of obscene knowledge on these facts is to unconstitutionally inhibit free expression. Although in *Smith v. California*, 361 U. S. 147 (1959), the Court was speaking of books and booksellers, the same reasoning applies to the motion picture field:

"* * * the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. * * * The bookseller's * * * timidity in the face of his absolute criminal liability thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it the distribution of all books, both obscene and not obscene, would be impeded." 361 U. S. 154.

While *amici* are more deeply committed to the proposition that all utterances must be tested by the principles and limitations provided by the First and Fourteenth Amendments (Arguments I and II above) and would hope that the Court would set aside the instant conviction on this broad ground, if this Court should refuse so to rule, we would then urge the Court to delineate the precise nature of the knowledge necessary to support a constitutionally valid obscenity conviction to "provide some small degree of safeguard to booksellers [and motion picture exhibitors] by making those who patrol bookstalls [and motion picture theaters] proceed less highhandedly than has been their custom." (bracketed material supplied.) *Smith v. California*, 361 U. S. 147, 169 (1959) (Douglas, J., dissenting).

IV. THE CONVICTION OF THE DEFENDANT-APPELLANT ON A COUNT OF POSSESSION AND CONTROL AND ALSO ON A COUNT OF EXHIBITION IS DOUBLE CONVICTION FOR THE SAME OFFENSE AND IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The original indictment in this case contained two counts, one charging *possession and control* of the film, the other charging its *exhibition*. On both counts the defendant was found guilty and on both counts he was duly sentenced: Five Hundred Dollars ($500.00) on the count of possession and control, Two Thousand Dollars ($2,000.00) on the count of exhibition. It is therefore obvious that the Court considered each of the two counts a distinct and punishable offense. It is submitted that in the context of the statute with which we are here concerned, the offenses are not distinct but, instead, inseparably intertwined.[70]

Before trial a bill of particulars was requested and it was supplied by the prosecutor. It alleges that the defendant is guilty of the possession and control charge by reason of his "position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations" of the theater; moreover, the bill of particulars informs us, the defendant is guilty of the exhibition charge by reason of his "position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations" of the theater.

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[70] The relevant portion of the statute reads "No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film * * *." The penalty section of the same statute reads "Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both." Section 2905.34, Ohio Revised Code.

The evidence adduced at the trial by the prosecutor was confined to proof that the defendant had constructive possession and control and exhibited the film in his capacity as the theater manager. Thus, the indictment, the bill of particulars, the evidence introduced, and the common sense of the matter all underscore the conclusion that what is presented here is a course of action, a single transaction, composed, no doubt, of separately identifiable elements, but nevertheless indivisible when serving, as here, as the basis for multiple convictions.

The doctrine of multiple offenses or identity of offenses has led to the development of a series of judicial tests. Three are presented here in the belief that they are representative of the most universally held concepts in this complex area.

A. "The test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of the transaction does not make a single offense where two are defined by the statutes." *D. C. v. Buckley*, 128 F. 2d 17, 19 (1942).

B. "Where several counts in an indictment charge in different ways the commission of the same offense, or charge the commission of different crimes or degrees of crime which, by reason of the fact that they are of the same character and grow out of the same transaction, are in effect parts or aspects of one offense, or where the crime charged in one count necessarily embraces the crime charged in another, it is erroneous for the court, on a finding of a general verdict or plea of guilty to impose separate penalties for the several counts, whether by way of separate sentences to run successively, or a single gross sentence lumping the several penalties. In such case accused is subject only to a single penalty on all counts constituting one entire offense, and the court may im-

pose such sentence on that count which charges the highest grade or degree of the offense involved, or which embraces the offense charged in other counts." 24 C. J. S., Criminal Law, Sec. 1567b(c).

C. "The distinction stated by Mr. Wharton is that 'when the impulse is single, but one indictment lies, no matter how long action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' *Wharton's Criminal Law*, 11th Ed., Sec. 34. Or as stated in note 3 to that section, 'The test is whether the individual acts are prohibited, or the course of action which they constitute.' If the former, then each act is punishable separately * * *. If the latter, there can be but one penalty.' " *Blockburger v. U. S.*, 284 U. S. 299, 302 (1932).

If each of the three tests is applied to the special fact situation here presented, it is plain that there is no basis for the double conviction. The *Buckley* test puts emphasis on the identity of the evidence required to sustain the convictions. Jacobellis could not have exhibited the film without possession or control of it. If the prosecuting officials inject the element of exhibition into the possession count to make it more than mere possession, the element is used up, consumed as it were, and is not available to support a separate count.

If the test expressed with clarity and definiteness in *Corpus Juris* is applied, the invalidity of the double conviction is immediately evident. Do we not here have a case in which "different crimes * * * are in effect parts or aspects of one offense"; in which "the crime charged in one count necessarily embraces the crime charged in another"?

The *Blockburger* test is especially appropriate and appears dispositive of the issue. It is a "course of action"

which the statute and the policy considerations that animate it seek to prohibit, the course of action of commerce in obscenity. The "impulse" was clearly a single impulse —an impulse to exhibit a film. To bisect the impulse into discrete parts may be of psychological interest but hardly sufficient justification for a multiplicity of criminal convictions.

It is noteworthy that there is judicial dissatisfaction with easy formulae in this area. The pre-eminent importance of personal rights demand that the courts do more than lay a yardstick next to a set of facts, take a measurement, and thus resolve the case.[71]

It is to this mechanistic and bloodless approach that Chief Justice Warren addressed himself in his dissenting opinion in *Gore v. U. S.*, 357 U. S. 386, 394 (1958): -

> "In every instance the problem is to ascertain what the legislature intended. Often the inquiry produces few if any enlightening results. Normally these are not problems that receive explicit legislative consideration. But this fact should not lead the judiciary, charged with the obligation of construing these statutes, to settle such questions by easy application of sterotyped formulae. It is at the same time too easy and too arbitrary to apply a presumption for or against multiple punishment in all cases or even to do so one way in one class of cases and the other way in another. Placing a case in the category of unit-of-offense problems or the category of overlapping-statute problems may point up the issue, but it does not resolve it."

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[71] Ohio seems to have done just this in the only reported instance of a double conviction and punishment for possession and sale of obscenity, *Overmyer v. Sacks*, 174 O. S. 129 (1962). There is no discussion in the opinion of the special and related character of the two offenses charged; only general statements as to the authority of the legislature to split a transaction into several crimes.

Similarly, disenchantment with formulae is found in Judge Rutledge's concurring opinion in the *Buckley* case, *supra*, at page 22. There was no difficulty in denominating the offenses charged as separate offenses in this case, one being driving while intoxicated, the other driving on the wrong side of the street. But Judge Rutledge felt impelled to comment on the special duties of a court confronted with the multiple offense problem:

> "* * * On narrow technical distinctions of method, means and specific intent, men may be convicted of the same general offense once, twice or many times, simultaneously or successively, as the prosecuting officials determine in their discretion. Some of the refinements are so thin that, if they hold, the old and substantial protection against trial or conviction more than once for the same offense is but a shadow of its intended self. The 'same or different evidence' rule only points out the difference. It puts no limit on how narrow the legislature can make it. I think the courts have a duty to do that, as well as one to find out whether the legislature has made a difference. In other words, it is for them finally to say whether a distinction prescribed by the legislature is strong enough to overcome the constitutional guaranty. Under the 'same or different evidence' test alone, they well nigh abandon that function in some cases where difference is very slight."

This Court has repeatedly asserted its constitutional capacity to examine criminal procedures carried out by the states. Granting that the Due Process clause does not vest this Court with total control over state criminal practices in all their myriad and variable forms, there has long been recognition that when the states invade the sacred precincts of fundamental liberty, that Clause will be wielded in defense of that liberty. This point needs no elaboration beyond the succinct exposition of Justice Frankfurter in *Rochin v. California*, 342 U. S. 165, 169 (1952).

"However, this Court too has its responsibility. Regard for the requirements of the Due Process clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even towards those charged with the most heinous offenses.' *Molinski v. New York*, 324 U. S. 401, at 416-417. These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked fundamental,' *Snyder v. Massachusetts*, 291 U. S. 97, 105, or are 'implicit in the concept of ordered liberty.' *Palko v. Connecticut*, 312 U. S. 319, 325."

Nor can it be reasonably claimed that to put mere possession outside the realm of punitive activity seriously hampers the state in its efforts to control traffic in pornography. It is only the traffic—in the form of sale, exhibition, or other means—that the state seeks to control. Indeed, the most practical means calculated to discourage possession of pornography (excepting only possession for private titillation, a form of possession which is psychological or social in origin and psychological or social in cure) is to enforce the laws proscribing its commerce.[72]

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[72] That mere possession is not a criminal act is the view of the Ohio Supreme Court, *State v. Jacobellis*, 173 O. S. 22 (1962). *State v. Wetzel*, 173 O. S. 16 (1962). *State v. Mapp*, 170 O. S. 427 (1960). When this case was reviewed by this Court, *Mapp v. Ohio*, 367 U. S. 643 (1961), the views of the Supreme Court of Ohio were endorsed. At page 672, Justice Stewart said "* * * I am persuaded that the provision of Section 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based is, in the words of Mr. Justice Harlan, not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.'"

The very heavy burden that Ohio's accordion-like construction of the statute imposes on a defendant can be illustrated by a simple and not untypical situation. If a merchant of pornography sells his wares, he is guilty of violation of the statute and may be imprisoned for seven years. If it is determined that at the time of the sale he had possession or control of his merchandise (how he could effectuate a sale without possession or control at least of a constructive nature is a conundrum), he is guilty on another count and may be imprisoned for a total of fourteen years. If in the course of negotiation, his customer should exercise his prerogative of asking for an inspection of the material before he hands over his money, the merchant is guilty on the count of exhibition and may be imprisoned for twenty-one years.[73] Yet it is plain that the Wharton "single impulse" test approved by this Court in the *Blockburger* case, *supra*, would not permit multiple convictions. The prohibited "course of action" is traffic, not the various steps leading to the prohibited act.

In other situations Ohio has set its face against multiple convictions.[74] What is sought here is neither an innovation in the law nor a departure from well-worn judicial paths in Ohio and elsewhere in the nation.

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[73] The application of the maximum penalty is not an idle hypothesis. Jacobellis was not sentenced to jail but he was given the maximum fine of $2,000.00 on the exhibition count, and an additional $500.00 on the possession count. There was no legal impediment to levying $2,000.00 on this count as well. It may be, however, that the 4 to 1 disparity between the two fines is indicative of the Court's differing attitudes as to the relative significance of the offenses.

[74] Obtaining explosives, their possession, placing them on the premises of another person without his consent and exploding them causing damage to property, "constitute a single continuing criminal act, inspired by the same criminal intent and the accused is subject only to a single penalty therefor." *State v. Weed*, 169 N. E. 2d 39 (Ohio Ct. App. 1954). Ohio follows the "one transaction" test. In the same case at page 42, the Court says, "If such

(*Continued on following page*)

CONCLUSION.

It will be contended by those who would suppress all disagreeable or offensive art and literature that obscenity is a social problem which must be controlled, even at the expense of some unfortunate but necessary inroads upon free expression. While *amici* ordinarily take no position on social problems not related to civil liberties issues, some comment on this position is indicated in view of the rather broad positions taken in this brief.

A voyeuristic society which permits a cheap tract to become an all-time best seller may well have an illness which needs social treatment. But traffic in obscenity (which requires consumers as well as purveyors) is a symptom of a social problem rather than an evil *per se*. It is, therefore, hopelessly ineffectual to attempt to treat this problem solely by obscenity prosecutions, broad in scope, which ignore entirely the underlying cultural, social and personality factors which make autoerotic fantasy material attractive to large segments of the public.

As Mr. Justice Warren, concurring in the result in *Roth*, has cautioned:

> "To recognize the existence of a [social] problem * * * does not require that we sustain any and all measures adopted to meet that problem. The history of the application of laws designed to suppress the obscene demonstrates convincingly that the power of government can be invoked under them against great art or literature, scientific treatises, or works exciting social controversy. Mistakes of the past prove that there is a strong countervailing interest to be con-

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(*Continued from preceding page*)

unlawful act or acts constituted one transaction, there could be but one sentence. It is permissible to charge separate offenses in different counts and join them all in one indictment, however upon trial, *if the facts show but one transaction*, there can be but one sentence." (Emphasis added.)

sidered in the freedoms guaranteed by the First and Fourteenth Amendments." 354 U. S. at 495.

This case presents, upon its facts, an opportunity for this Court to re-examine: (1) its holding in *Roth* that obscene material is not within the protection of the First and Fourteenth Amendments, and (2) the verbal formula contained in *Roth* for determining what is constitutionally unprotected "obscenity."

The facts of the instant case also require consideration of the quality of *scienter* necessary to a constitutional obscenity conviction. Further, this case presents for determination the question whether conviction on separate counts for a single transaction is double punishment in violation of the Fourteenth Amendment.

Freedom of expression and due process of law require a reversal of the defendant-appellant's conviction for each of these reasons.

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No. [redacted] 11

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE APPELLANT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF FOR THE APPELLANT.

Opinions Below.

The appellant was charged with possessing an obscene film, "The Lovers", and with exhibiting the film at the Heights Art Theatre in the City of Cleveland Heights. He was tried by three Judges in the Court of Common Pleas of Cuyahoga County, Ohio and was found guilty of both charges on June 8, 1960. The opinion is not reported but is printed at R. 500-1.

The judgment of conviction was affirmed June 21, 1961 in the Court of Appeals for Cuyahoga County and the opinion is reported at 175 N. E. 2d 123 (R. 501-506).

The judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio on January 17, 1962. The opinion is reported at 173 Ohio St. 22 and 179 N. E. 2d 77 (R. 510-520).

Statement of the Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1257 (2).

The decree sought to be reviewed was entered by the Supreme Court of the State of Ohio on January 17, 1962. The Notice of Appeal to the Supreme Court of the United States was filed April 12, 1962 in the Supreme Court of the State of Ohio, and in the Court of Appeals in Cuyahoga County, State of Ohio, and in the Court of Common Pleas, County of Cuyahoga, State of Ohio.

Probable jurisdiction was noted October 8, 1962 (R. 524).

The Constitutional Provisions and Statutes Involved

The Constitution of the United States,

First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Statutes Involved

Ohio Revised Code Section 2905.34. "*Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes:*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

(Page's Ohio Revised Code Annotated, Title 29, 1962 Supplement, at p. 8, 9.)

The texts of Ohio Statutes modifying or affecting §2905.34 that are referred to in the brief, are set forth in the Appendix.

The Questions Presented for Review

(1) Whether Section 2905.34 of the Ohio Revised Code abridges the freedom of the press, in violation of the First and Fourteenth Amendments in punishing the private possession of obscene material, and in punishing one who, without guilty knowledge or wrongful intent, exhibits obscene material.

(2) Whether Appellant was denied due process by the Ohio Supreme Court's adoption, on the appeal from Appellant's conviction, of an interpretation of the statute governing the offenses, in conflict with an earlier interpretation given by the same Court, the prior construction having been followed by the Court in which Appellant was convicted.

(3) Whether Section 2905.34 of the Ohio Revised Code is void in its entirety because it contravenes the First and Fourteenth Amendments in the majority of its intended applications, and is so vague and indefinite that it permits arbitrary and discriminatory enforcement and fails to forewarn those subject to the law of the conduct it prohibits.

(4) Whether the trial court in convicting Appellant, and the Court below in affirming his conviction of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court, and punished Appellant for dealing with a film within the protection of the First and Fourteenth Amendments of the Constitution.

(5) Whether Section 2905.34 of the Ohio Revised Code infringes the right of communication protected by the First and Fourteenth Amendments, and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony to possess or exhibit an "obscene" motion picture.

Summary of Argument

I. Section 2905.34 of the Ohio Revised Code prohibits the exhibition and the possession of obscene books and films. Appellant was tried and convicted of violating the statute. At the time of his trial the statute, as construed by the Ohio Supreme Court, punished mere possession of an obscene book or film (so long as the person in possession had knowledge of the content) and punished the sale or exhibition of such material though the book-seller or exhibitor was innocent of any culpable intent or purpose. The statute as it was then interpreted and applied is repugnant to the constitutional right of free press, for in punishing innocent conduct it discourages acquisition and dealing in books and motion pictures.

After the Appellant was convicted, the Ohio Supreme Court in its opinion affirming Appellant's conviction, adopted a construction of the statute in direct conflict with its earlier interpretation. The change in the meaning of the statute was given retroactive effect. As a result Appellant was deprived of rights without due process of law for Appellant was denied the opportunity to prepare his defense against the charge of offending the statute as revised, and he was denied the right, on appeal, to have the validity of his conviction appraised on the consideration of the case as it was tried.

II. Section 2905.34 of the Ohio Revised Code is unconstitutional in the majority of its intended applications; it also has an inhibitory effect on expression, and for those reasons should be held unconstitutional in its entirety. The section prohibits the sale of books "not wholly obscene" in violation of the constitutional requirement that a book be judged by the dominant effect of the work as a whole. The statute is unconstitutionally vague in that it prohibits and punishes the loan, gift or sale of "immoral" or "indecent" drawings, representations and articles. The statute is unreasonable in prohibiting such conduct as giving or showing police reports or accounts of criminal deeds (including accounts intended to inculcate moral principles), to a minor. The statute is unconstitutional in that it makes it a criminal offense punishable by 7 years imprisonment to keep in view, on any newsstand that minors may pass, newspapers or books devoted to news or stories of crimes, or to accounts of immoral deeds.

III. Appellant was convicted and fined for exhibiting the film "The Lovers." The film is not obscene and the conviction of Appellant was therefore in contravention of rights guaranteed by the First and Fourteenth Amendments. The film was not judged by the Ohio Courts in accordance with constitutional standards. It was judged by the effect of an isolated sequence, and in accordance with the supposed standards of the people of Cuyahoga County. The requirement that those who deal with periodicals, books or films, conform to the differing standards of each town, township and rural area imposes an insupportable burden on publishers, producers and distributors of books, films and magazines, and abridges the freedom of the press. The Ohio Courts in holding "The Lovers" obscene also erred in failing to take into consideration its redeeming social value.

IV. A statute punishing the sale of obscene material violates the First Amendment right of communication and is void for vagueness, for the word obscene is not capable of reasonably precise or clear definition.

Statement of the Case

This appeal is from a judgment of the Supreme Court of the State of Ohio affirming Appellant's conviction of the crimes of possessing an obscene film entitled "The Lovers" (Pl: Ex. 1-A and 1-B; R. 27,100) and of exhibiting the film at the Heights Art Theatre in the City of Cleveland Heights, Ohio (R. 509). Appellant was fined $500 on the first count and $2,000 on the second count, and was committed to the Workhouse until both fines, and the costs of the prosecution, were paid (R. 7-8). Execution of the sentence was stayed pending appeal (R. 8).

At the time of the indictments the Appellant Jacobellis was the manager of the Heights Art Theater (R. 465), one of a chain of fifteen theaters (R. 324). All films shown at the Heights Art Theater were selected by the two owners of the company that operated the chain. One of the owners of the company lived and worked in Ohio (R. 324-5). The Heights Art Theatre catered to adult audiences and the films exhibited there were of high quality (R. 467-8).

Appellant's duties as manager of the theater were to screen films for critics (R. 466), arrange for the placement of advertisements prepared for him (R. 478), and to supervise operating personnel (R. 466). Appellant did not take any part in selecting films or in deciding when they were to be shown (R. 466). He had no authority to make any cuts or changes in the pictures and he testified that he would have been discharged if he refused to show a film chosen for the theater (R. 466).

The film found obscene in the Courts below is entitled "The Lovers". It was produced in France and is based on a popular 19th century French novel "Point de Lendemain" (Dft. Ex. I; R. 493, 1332). The principal character in the film is portrayed by Jeanne Moreau, one of France's leading actresses (R. 363). The director of the film, Louis Malle has an established reputation in his country and received an award in the United States from the Academy of Motion Picture Arts and Sciences (popularly known as an "Oscar") (R. 363).

The story of the film is about a sophisticated, superficial, woman who sacrifices husband, child, home, comfort, security and social position for an uncertain life with a young archaeologist with whom she has, quite suddenly, fallen completely in love.

There is an intense, love scene between the woman and the archaeologist in the last reel of the film. The State's objections to the film are based almost entirely, on that scene. Film critics and an expert called as witnesses by the defense expressed the view that the sequence was beautifully acted and filmed, and that it was necessary to make the woman's transformation and conduct appear credible (R. 461-2; Deft. Ex. I; R. 492, 1332; Dft. Ex. H-1; R. 490, 1331). Hollis Alpert, film critic of The Saturday Review of Literature made the following comment on the scene: "I was reminded of a story by de Maupassant called "Moonlight," in which a priest watches a girl and a boy commit what in his eyes must be an act of sin, and yet he does not disturb them, but walks away with the sense that he has, after all, seen the inscrutable workings of God" (Dft. Ex. I; R. 491, 1331).

"The Lovers" received the second prize at the International Film Festival in Venice (R. 359) and was voted one of the best films of the year 1959 by Hollis Alpert, Arthur

Knight, also of the Saturday Review of Literature, and by Bosley Crowther, film critic of the New York Times (R. 176, 403).

When "The Lovers" was brought to the United States it was examined by Customs authorities in New York and in Washington, and the Bureau of Customs judged the film to be "not obscene" (Dft. Ex. K; R. 496, 1334). The film was shown in approximately 100 of the larger cities in the United States including Washington, D. C., Boston, New York, Providence, Hartford, Detroit, and San Francisco (R. 361).* Before it was sent to Jacobellis for exhibition at the Heights Art Theater, it was also shown in Columbus and Toledo, Ohio (R. 326-7, 330).

The film was reviewed by film critics in the United States as a production worthy of serious consideration. The tenor of some of the favorable reviews has been indicated. Some of the critics damned the picture. Ward Marsh, film critic of the Cleveland Plain Dealer, and a witness for the prosecution thought the sequence referred to was filthy, and the remainder of the film, dull (R. 149, 121). Henry Hart, editor of "Films in Review," (also a witness for the State) was of the same opinion (R. 215).

The Court below described "The Lovers" as "87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity." (*State* v. *Jacobellis*, R. 517) 173 Ohio St. at p. 28. The statement that there was a "*showing* of an act of perverted obscenity" was not intended literally. During the scene in question the camera is focused on the shoulders, face and hand of

* Deletions of 131 feet (about half a minute) were made in the film licensed and shown in New York and Boston (R. 378) but the witnesses who saw the New York and the Ohio versions were unable to perceive any difference between them (R. 302-3, 440-1).

the principal character. The witnesses for the prosecution testified that they *"inferred"* or *"imagined"* that an unnatural sexual act was being performed "off the screen" (R. 123, 134, 161). Apparently the Ohio Supreme Court reached the same conclusion. One of the State's witnesses who imagined that an act of perversion was performed out of the camera's range, also testified that a map shown at the beginning of the film was suggestive to him, of sexual intercourse (R. 203).

It is not claimed that the Appellant Jacobellis believed "The Lovers" was pornographic, or that his presentation of it was clandestine, or that his conduct in any way evidenced an illicit purpose. When the film was received from his employer he placed an advertisement in the local paper (R. 43) and arranged a pre-view for film critics, (R. 467) with the understanding, of course, that their reviews would be published when the film was shown.

The police of Cleveland Heights learned that "The Lovers" was to be shown as a result of an advertisement in the Cleveland Plain Dealer (R. 43). Captain Gordon, chief of the Cleveland Heights police, called Jacobellis a few hours before the first showing. In answer to the Captain's inquiry with respect to the nature of the picture, Jacobellis spoke of it as "beautifully done" in "good taste" and invited the police chief to the opening (R. 44).

The police chief accepted the invitation and was present at the first showing of the film in the Heights Art Theatre on November 12, 1959 (R. 45). He did not then advise Jacobellis that he found "The Lovers" objectionable and did not suggest that the film be withdrawn (R. 473). Captain Gordon returned to the theater on November 13th, 1959 with some other County officials, and after seeing the

picture again (R. 47) seized the film, and arrested Jacobellis (R. 475-6).

Two indictments were thereafter handed down against Jacobellis. One accused him of possessing on November 13, 1959 "a certain obscene, lewd and lascivious motion picture film, to-wit: (Les Amants) "The Lovers," and the other charged him with exhibiting the picture on the same day (R. 1, 9, 10). Jacobellis was tried by 3 Judges in the Court of Common Pleas of Cuyahoga County, Ohio, and was found guilty of both charges on June 8, 1960 (R. 7). The judgment of conviction was affirmed June 21, 1961 in the Court of Appeals for Cuyahoga County (175 N. E. 2d 123, R. 506), and the judgment of the Court of Appeals was affirmed by the Supreme Court of the State of Ohio January 17, 1962 (173 Ohio St. 22, 179 N. E. 2d 77, R. 509).

POINT I.

Section 2905.34 of the Ohio Revised Code, as interpreted when appellant was tried, violated the constitutional guarantees of freedom of communication. The affirmance of appellant's conviction under a different and conflicting interpretation of the statute was a denial of due process.

Jacobellis was charged, tried and convicted under the first clause of Section 2905.34, of the crimes of possessing and of exhibiting an allegedly obscene film. On March 23, 1960, a few days before Jacobellis' trial began, the Ohio Supreme Court published its opinion in *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387, in which it held that knowledge of the circumstances, in that case knowledge of the content of the material (i.e. *scienter*) *was* required in a prosecution under §2905.34; but that awareness of wrong-

doing (i.e. culpable intent or purpose) *was not*, a constituent element of the crimes outlined in the statute. The Court held in *Mapp* that all that the statute required was a showing of knowledge of the facts, and it did not require proof of criminal purpose or knowledge that the conduct violated the law.

In the *Mapp* case the defendant was charged with knowing possession of obscene books and other material. The defendant Mapp claimed that the books had been left by a tenant, and that after discovering and examining them she put them away to await the owner's return. The Ohio Supreme Court ruled in sustaining the defendant's conviction in *State* v. *Mapp, supra*, that Section 2905.34 forbade even innocent possession, and that one could be sentenced as a felon under the statute for merely having a book though he acquired it without knowledge of its character, and after examining it and discovering it to be obscene, determined never to look at it again. 170 Ohio St. 433, 166 N. E. at 390. "If anyone looks at a book and finds it lewd" Judge Taft said for the Court in *State* v. *Mapp*, "he is forthwith under this legislation guilty of a serious crime" (170 Ohio St. at 433, 166 N. E. at 391).

The legislative history of the section allowed no other interpretation than that given by the Ohio Court in *Mapp*. An earlier version of the statute provided that knowing possession of obscene books etc. was punishable provided such possession was for the purpose of later distribution. That proviso was eliminated in the 1939 amendment of the statute and was never restored. *State* v. *Mapp*, 170 Ohio State at 427, 166 N. E. 2d at 392.*

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* Although *State* v. *Mapp* dealt only with the charge of possessing obscene matter, it is clear that the finding that one may be guilty of that crime under Section 2905.34 without culpable intent, would also apply to the statutory prohibition against sale, gift or exhibition of obscene matter. Section 2905.34 provides "No person shall

The construction of Section 2905.34 in *State* v. *Mapp*, 170 Ohio St. 427 became the definitive interpretation of the statute and was binding on all law enforcement agencies in Ohio. (*Mapp* v. *Ohio*, 367 U. S. 643 at 675, dissenting opinion of Mr. Justice Harlan). The statute had previously been given the same construction in *State* v. *Cowan* (1958), 7 Ohio Ops. 2d 81, in which the following rationale of the legislation was given:

> "a narcotic physically poisons the mind and body and is injurious to both moral qualities and physical structures . . . so too, does admittedly obscene material mentally poison the mind . . ."
>
> "* * * The claim that possession in and of itself cannot be wrong is overcome for the same reasons as have been applied above." (7 Ohio Ops. 2d 81-82)*

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knowingly sell, lend, give away, exhibit . . . or have in his possession or under his control an obscene etc.". The term "knowingly" qualifies the verbs "sell", "lend", "giveaway" and "exhibit" and was held in *Mapp* to apply also to the phrase "or have in his possession". It obviously cannot have one connotation (i.e. *scienter*) when applied to "possession" and another (*scienter* and *criminal purpose*) when applied to the words "lend", "give away" and "exhibit". It would be manifestly absurd to hold that the statute punishes innocent possession but does not punish sale or exhibition unless it is with intent to violate the law.

* Mr. Justice Brennan made the following answer to the argument from a similar analogy in Smith *v.* California (1959) 361 U. S. 147, 152-3: "The appellee and the court below analogize this strict liability penal ordinance to familiar forms of penal statutes which dispense with any element of knowledge on the part of the person charged, food and drug legislation being a principal example. We find the analogy instructive in our examination of the question before us. The usual rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors—in fact an absolute standard which will not hear the distributor's plea as to the amount of care he has used. . . . There is no specific constitutional inhibition against making the distributors of food the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the book seller."

In the instant case the Appellant Jacobellis filed a demurrer to the indictment in the Ohio Court of Common Pleas, in part on the ground that Section 2905.34 is unconstitutional because of its failure to require the showing of criminal intent. The Court made the following ruling (R. 12):

> "This trial Court unanimously agrees that it is bound by the case of the State of Ohio *vs.* Dollree Mapp, 170—O. S.—427, and by the appellate decision therein, in which the constitutionality of Revised Code 2905.34 is upheld; and, therefore, this Court is overruling the demurrer herein, to which defendant may save his exception."

As the Judges who tried Jacobellis held, they were bound by the construction of Ohio Revised Code Section 2905.34 given in *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387 (R. 12), and Jacobellis' conviction by the Court of Common Pleas on June 8, 1960 was based on that interpretation of the statute.

An appeal from the judgment of the Ohio Supreme Court in *State* v. *Mapp, supra*, was taken to this Court, and it was pending at the time Jacobellis was tried. The *Mapp* appeal was determined June 19, 1960, eleven days after Jacobellis was convicted. This Court reversed the judgment of the Ohio Court in *State* v. *Mapp* because the conviction had been obtained by the use upon her trial, of evidence seized during an unlawful search of the Appellant *Mapp's* home. Justices Harlan and Stewart indicated in their opinions in *Mapp* v. *Ohio*, 367 U. S. 676, 686 that the appeal should have been decided on the question of the validity of Ohio's Section 2905.34 "which as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of

such possession or control . . . and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, . . ." *Mapp* v. *Ohio*, 367 U. S. 643, 676-677. Mr. Justice Stewart wrote, in his opinion in *Mapp* v. *Ohio* (367 U. S. at 686):

> "I would, however, reverse the judgment in this case, because I am persuaded that the provision of §2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice Harlan, *not* "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment" (emphasis ours).

Jacobellis' appeal to the Ohio Supreme Court from the judgment convicting him, was heard *after* the opinions of this Court in *Mapp* v. *Ohio* were announced. Forewarned, by the opinion of Mr. Justice Stewart, that this Court might strike down §2905.34 as interpreted in *State* v. *Mapp*, the Ohio Supreme Court, in affirming Jacobellis' conviction, adopted a contrary construction and held that the statute required a showing of guilty knowledge and purpose as essential elements of the crime. *State* v. *Jacobellis* (R. 514) 173 Ohio St. at 27.

"In the phrase, "knowingly possess,", Judge Radcliffe wrote for the Ohio Supreme Court in this case, "as used in criminal statutes, is implicit not only the element of *scienter* but also the element of *mens rea*, namely, a guilty wrongful purpose. *It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic.*" (emphasis ours) *State* v. *Jacobellis* (R. 514, 173 Ohio St. at 27).

While solemnly proclaiming its "high regard for the doctrine of *stare decis*" in its opinion in this case, (R. 518) 173

Ohio St. at p. 28 the Ohio Supreme Court abrogated its determination, made 20 months before, without a single dissent on that question. One reading only the majority opinion in *State* v. *Jacobellis* would be led to believe that the Ohio Supreme Court never held a different view, and that there had never been any other authoritative interpretation of §2905.34. There isn't a reference in the majority opinion in *State* v. *Jacobellis* either to the decision in *State* v. *Mapp* or to Mr. Justice Harlan's exposition, in *Mapp* v. *Ohio*, 367 U. S. at 675, of the statute as originally construed, though it would be difficult to conceive of interpretations more at variance.*

The validity of the statute must be determined as it was construed when the Appellant was tried and punished for its violation, *Cole* v. *Arkansas* (1948), 333 U. S. 196; *Jones* v. *Opelelka*, 316 U. S. 584, 603, dissenting opinion, followed on rehearing (1943) 319 U. S. 103. As it was interpreted in *State* v. *Mapp*, 170 Ohio St. 427, and by the Trial Judges

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* Judge Taft: (*State* v. *Mapp* 170 Ohio St. at 433) "if anyone looks at a book and finds it lewd he is forthwith under this legislation (Section 2905.34) guilty of a serious crime." (matter in parenthesis ours).

Mr. Justice Harlan: (dissent in *Mapp* v. *Ohio* 367 U. S. at p. 675) "The Ohio statute (§2905.34) which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control . . . and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene . . . (matter in parenthesis ours).

Judge Radcliffe: (*Jacobellis* v. *State* (R. 516, 173 Ohio St. 27). "It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he . . . forms the mens rea and acts in furtherance thereof.".

"Statutes sometimes receive heroic treatment at the hands of courts in construing them so as to sustain their constitutionality" Judge Van Voorhis wrote in dissent in *People* v. *Finkelstein*, (1961) 9 N. Y. 2d 342, 347, "but" he added "that is a practice which is necessarily more limited in criminal than in civil actions where the effect is to redefine the nature of a crime ex post facto."

who tried and convicted Jacobellis (R. 12), Section 2905.34 was unconstitutional. The Ohio Supreme Court deprived Jacobellis of due process in attempting to validate his conviction under a void statute by changing the meaning of the statute on the appeal from his conviction.

We shall consider first the unconstitutionality of Section 2905.34 of the Ohio Revised Code as interpreted when Jacobellis was convicted, and then the denial of due process by the attempt to change the interpretation of the statute on the appeal from his conviction.

Section 2905.34 of the Ohio Revised Code was unconstitutional as construed when Jacobellis was found guilty of its violation

There can be little doubt that Section 2905.34 as construed in *State* v. *Mapp*, and as applied by the Trial Court in this case, is unconstitutional. Even the majority of the Ohio Supreme Court in *State* v. *Mapp* were of the opinion that Section 2905.34 infringed the constitutional right of free press because it would "discourage law abiding people from even looking at books and pictures" 170 Ohio St. at 432, 166 N. E. 2d 391. Judge Herbert, in a separate opinion in *State* v. *Mapp* wrote: "to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual." (170 Ohio St. at p. 437, 166 N. E. 2d at 393).

Section 2905.34, was not declared invalid by the Ohio Supreme Court in *State* v. *Mapp* because the Ohio Constitution requires a concurrence, in such case, of six of the seven Judges of the Ohio Supreme Court in the finding of unconstitutionality, and only four of the Judges joined in that opinion, 170 Ohio St. at p. 434, 166 N. E. 2d at 391; *Mapp* v. *Ohio*, 367 U. S. 643 at p. 673 fn. 3.

In *Smith* v. *California*, (1959) 361 U. S. 147 the Court struck down an ordinance making the offering of obscene books a penal offense even though the bookseller may not have been aware of the content of the material offered. The ordinance involved in *Smith* completely eliminated the requirement of *scienter* and imposed a strict criminal liability on any store owner possessed of an obscene book whether or not he had seen the book, or knew what it contained. Such ordinance, the Court held, tends to restrict the sale and distribution of constitutionally protected expression by making it necessary for booksellers to read all books received for sale, in order to avoid criminal liability, 361 U. S. at p. 153.

The Court did not find it necessary in *Smith* v. *California*, *supra*, to determine whether a statute punishing the holding or offering of obscene material for sale, meets constitutional requirements if it dispenses with the requirement of culpable intent and with the requirement of knowledge or reason to believe that the material is in fact obscene. Mr. Justice Brennan wrote for the Court: "We need not and definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; *whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse;* whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be" (361 U. S. at p. 154, emphasis ours).

The Court's reasons for condemning the ordinance involved in *Smith* v. *California* 1959 (361 U. S. 147) how-

ever, apply with equal force to the statute here challenged. In the *Smith* case the Court said, 361 U. S. at p. 152:

> "The ordinance here in question, to be sure, only imposes criminal sanctions on a bookseller if in fact there is to be found in his shop an obscene book. But our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold."

A statute prohibiting possession or exhibition of obscene matter, that fails to require proof of culpable intent, also imposes an excessive burden on those who deal with books, periodicals and films by compelling them to do so at their peril, and thus inhibits the flow of communication. This Court has for that reason, consistently condemned laws punishing expression where "drawn without regard to the presence or absence of guilty knowledge", *Sweezy* v. *New Hampshire*, (1957) 354 U. S. 234, 248; *Herndon* v. *Lowry* (1937), 301 U. S. 242, 259; *Winters* v. *New York*, (1948) 333 U. S. 507, 519; *Weiman* v. *Updegraff*, (1952) 344 U. S. 183, 191; *Speiser* v. *Randall*, (1958) 357 U. S. 513, *Staub* v. *Baxley*, (1957) 355 U. S. 313, 325.*

The statute here challenged is an example of the inhibiting effect of a law proscribing obscene publications, which does not require the showing of unlawful intent. In *State* v. *Mapp*, 170 Ohio St. 427, 166 N. E. 2d 387, Judge Taft wrote for the Ohio Supreme Court, referring to Section 2905.34 as it was then construed (and as it was construed

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* We are not in this discussion, considering the injustice of punishing one who is morally innocent.

by the Trial Court in this case) (170 Ohio St. 431, 166 N. E. 2d 391):

> "It may be argued that the legislation involved in the instant case, unlike that in the *Smith* case, requires *scienter* because it only makes it unlawful to "*knowingly* . . . have . . . possession". However, this legislation is analogous in its effect to that in the *Smith* case. If anyone looks at a book and finds it lewd, he is forthwith under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result someone who might otherwise read books that are not obscene may well be discouraged from doing so, and their free circulation and use will be impeded."

See also Mr. Justice Stewart's concurring opinion in *Mapp* v. *Ohio*, 367 U. S. at 686, quoted at p. 15 of this brief.

Mr. Justice Harlan remarked, in his opinion in *Roth* v. *United States*, that obscenity is not "a particular genus of 'speech and press' which is as distinct, recognizable and classifiable as poison ivy among plants, . . . the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind" 354 U. S. at p. 497. Courts have frequently differed in determining whether a particular work is obscene. If men learned in the law may be mistaken in judging whether material is obscene, it is unjust to imprison a dealer in books for falling into a like error in making that difficult judgment. The punishment of such honest mistake will inevitably act as a restraint upon the exercise of the constitutional right of communication. Requiring proof of the mental element of wrongful purpose does not, as Mr. Justice Brennan indicated in *Smith*, present any counterbalancing problem, or

impose a burden in enforcing the law, that would justify the restraint upon the press, 361 U. S. at 154.

There are, as Mr. Justice Harlan noted, acknowledged masterpieces in the fields of literature, science and art that may be said "to appeal to the prurient interest of the reader or observer", *Manuel Enterprises v. Day* (1962) 370 U. S. at p. 487. Knowing that an error in judgment will be punished as a crime a bookseller or art dealer will be moved by prudence to reject works that in his opinion are of enduring value, if he has reason to believe that local government officials will disagree with his judgment.

In this case Jacobellis exhibited the film at the direction of his employer (R. 466). He believed that the film was beautifully made (R. 44) and was so certain that it was free of obscenity, that he invited the local police chief to attend the first showing of the film (R. 44). Jacobellis' views were sustained by the finding of a federal government agency (Dft. Ex. K; R. 496, 1334) and the published views of eminently qualified film critics (R. 469; 470). If Jacobellis' conviction is sustained, those who deal in books, films, plays and periodicals may be well advised wherever there is the slightest doubt, to refuse to proceed without the imprimatur of the local police.*

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* We have no reason to rely on the judgments of policemen and government prosecutors. They have not shown great wisdom in their appraisals of serious writing and artistic endeavor. In recent years the works of Eugene O'Neil, Ernest Hemingway, William Faulkner and John Steinbeck (to name only American authors awarded the Nobel prize for literature) have been banned as obscene. Pearl Buck appears to be the only American Nobel laureate in literature whose writing has not been found obscene. In January 1963 the State of Kansas found an otherwise unexceptionable film (and an excellent one) obscene because of the use of the word "slut" in the dialogue. Not many years ago, the Cleveland police objected to the sale of Freud's General Introduction to Psychoanalysis because of its emphasis on sex. The First Freedom, p. 181, The American Library Association.

The Appellant Jacobellis was denied due process by the Ohio Supreme Court's decision retroactively changing the meaning of the statute he was convicted of violating.

The opinion of Mr. Justice Stewart in *Mapp* v. *Ohio*, 367 U. S. 643, 686 was taken as an indication that this Court would in a later case hold Section 2905.34 unconstitutional as it was construed in *State* v. *Mapp, supra.* The Ohio Supreme Court, to avoid such determination in this case, adopted a construction contrary to that upon which the case was tried. It was assumed that this Court would, under the familiar rule, accept and follow the most recent construction of a State statute by the highest court of the State. Cf. *Douglas* v. *Pike* (1880), 101 U. S. 677, 686. Judge Taft, in his dissent in the Court below, intimated that the changed interpretation of the statute would be helpful in avoiding a review by this Court (R. 519, 520, 173 Ohio St. at p. 30). Whether or not the Ohio Court could save the statute by modifying its earlier reading, the affirming of Jacobellis' conviction under a different law than the one he was convicted of violating, was clearly a denial of due process.

In *Cole* v. *Arkansas* (1948), 333 U. S. 196, the Court reversed a conviction on the ground that the Appellant had been charged under one section of a statute and his conviction was affirmed by the highest Court of the state under a different section. The rule of *Cole* v. *Arkansas, supra*, is applicable here for the Appellant Jacobellis was convicted under a statute that omitted the element of culpable intent and his conviction was affirmed under a statute that the Ohio Supreme Court said required such intent.

In its opinion in this case, the Ohio Supreme Court in answering one of the Appellant's contentions, made a comparison between Sections 2905.34 and 2905.342 of the Ohio Revised Code, both of which punish possession and exhibition of an obscene motion picture. The Court found that the

two statutes were totally different and involved "no common principle of law" because the latter section omitted the element of *scienter*, while the former required it to be shown as an element of the crime *State* v. *Jacobellis* (R. 518, 173 Ohio St. at p. 28). For the same reasons, the absence of the requirement of culpable intent in the statute under which Jacobellis was tried, made it a different statute from the one under which his conviction was sustained.

The judges of the County Court who tried Jacobellis acknowledged that they were bound by the law as it was set forth in *State* v. *Mapp* (R. 12). They found him guilty, in the belief that no proof of guilty knowledge was required, and obviously without proper consideration of the proof submitted on, or the question of the burden of proving, that issue. See *Speiser* v. *Randall*, (1958) 357 U. S. 513. The attempted change in the meaning of Section 2905.34 by the Ohio Supreme Court in *State* v. *Jacobellis, supra*, could not retroactively affect the Trial Court's contrary understanding of the law.

Jacobellis was tried and defended his case on the theory that culpable intent was not an essential element of the crime, or a necessary part of the prosecution's case, or that the absence of such intent might constitute a defense. He was thus in effect denied the right to submit evidence in his defense on an issue that became a vital issue in the case after his conviction. A penal statute must state precisely what conduct is prohibited so that a person may know in advance what actions are proscribed and what defense may be interposed. *Lanzetta* v. *New Jersey*, (1939) 306 U. S. 451, 453. One charged with offending against a penal statute cannot be compelled to assume the burden of a change in the meaning of the law by subsequent construction. *Connally* v. *General Construction Co.*, (1926) 269 U. S. 385, 391, 392-393, 395; *Thomas* v. *Collins*, (1945)

323 U. S. 516, 535. A retroactive change in the definition of a statutory crime after one has been convicted of committing it, denies both the opportunity to avoid offending the law, and the opportunity to prepare the defense against the charge of violating it.

Due process was also denied the Appellant Jacobellis in connection with his appeal to the Ohio Supreme Court. The appeal proceeding, being available to all in similar circumstances, was as much a part of the process of law, to which Jacobellis was entitled, as any other. *Frank* v. *Magnum*, (1915) 237 U. S. 309, 327. The Ohio Supreme Court by adding a new element to Revised Code Section 2905.34 after Jacobellis' trial, denied him the right of a hearing on appeal with respect to the constitutionality of the statute as it was applied in his case. As Mr. Justice Black said in discussing that point in *Cole* v. *Arkansas*, (1948) 333 U. S. 196, 202: "To conform to due process of law petitioners were entitled (on the appeal) to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court" (matter in parentheses ours).

Section 2905.34 as interpreted at the time Jacobellis was convicted was, as we have seen, unconstitutional. An unconstitutional statute is ". . . as inoperative as though it had never been passed". *Norton* v. *Shelby County*, (1886) 118 U. S. 425, 442. Since Appellant's conviction was not under law, it could not be validated by a changed concept of the statute on appeal.

There have been other cases in which State Courts reversed their earlier view of the validity or interpretation of a statute. It has been the general rule in such cases to give the overruling decision only prospective effect if to give it retroactive effect would be to the detriment of an

accused. In *State* v. *Longino*, (1915) 109 Miss. 125, 67 So. 902, the Court said (109 Miss. pp. 133-134):

> "We think that a change of decisions involving the interpretation of criminal statutes should have a prospective effect. The rule seems to be the just and the reasonable rule. This rule applies the same principle as the constitutional prohibition of ex post facto legislation. It will prevent injustice . . .".

In *State* v. *Bell*, (1904) 136 N. C. 674, 49 S. E. 163, the Court found, contrary to an earlier decision, that a Defendant-appellant's conduct was within the purview of a criminal statute. The Court held, however, that the new construction put upon the statute would apply only to future cases, and said, in reversing the Defendant's conviction (136 N. C. pp. 676-677):

> "We are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this court. So, to try them by the law as herein announced would be an injustice."

Again, in *State* v. *O'Neil*, (1910) 147 Iowa 513, 126 N. W. 454, a statute that had previously been held unconstitutional by the Court, was sustained as vaild. The appellant's conviction under the statute was, however, reversed, for as the Court said (147 Iowa p. 521):

> "To the ordinary mind it would smack of absurdity to say that the defendant ought to have known that the statute was constitutional . . . although the Supreme Court of the State . . . had unanimously held that it was . . . invalid. Under such circumstances it is plain that there should be some relief to Defendant from punishment, for the very purpose of punishment is defeated if unreasonably and arbitrarily imposed."

> rights of free expression with the expense and inconvenience of criminal prosecution. *Thornhill* v. *Alabama*, 310 U. S. 88, 97, 98, Cf. *Staub* v. *Baxley*, 355 U. S. 313."

The principal constitutional objection to each clause of the statute relating to communications, other than the first (which is analyzed and shown to be unconstitutional in Point I of this brief) will be outlined seriatim.

The second clause of Section 2905.34 provides:

> "No person shall knowingly sell, lend, give away . . . or have in his possession or under his control an . . . book, pamphlet, paper, magazine, *not wholly obscene* but containing lewd or lascivious articles, advertisements, photographs . . .". (emphasis supplied)

In *Roth* v. *United States* (1957), 354 U. S. 476, 489 the Court held that a work may not constitutionally be proscribed merely because isolated parts are thought obscene. The Court ruled that to so judge a work by separate parts or portions was restrictive of the freedoms of the speech and press, and held that the test in each case, if the judgment is to meet constitutional standards, must be the dominant effect of the work as whole. *Roth* v. *United States* (1957), 354 U. S. at p. 490.

Section 2905.34 provides further:

> "No person shall knowingly sell, lend, give away . . . or have in his possession or under his control an . . . drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature . . .".

It is a hornbook rule that a statute making conduct criminal must clearly define the prohibited conduct so that

those affected will know what acts are forbidden. If one cannot, by reading a statute, know what acts will offend against it, an attempt to enforce the statute violates the due process guarantee of the Fifth or Fourteenth Amendment. *Connally* v. *General Construction Co.*, (1926) 269 U. S. 385, 391; *Lanzetta* v. *New Jersey*, (1939) 306 U. S. 451, 453; *United States* v. *L. Cohen Grocery*, (1920) 255 U. S. 81; Due Process Requirements of Definiteness in Statutes, 62 Harv. L. R. 77 (1948). Such law, as Justice Jackson observed, "fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused". *Musser* v. *Utah*, (1947) 333 U. S. 95, 97.

Certainly the language of Section 2905.34 under consideration does not forewarn anyone subject to the law, of the nature or sort of drawings and representations that will be considered "immoral" within the sweep of the law, and the possession of which may subject one to imprisonment for seven years. The terms "immoral or indecent" are not descriptive of the category of articles or representations within the compass of the law; they are subjective words of disapprobation, and their meaning will vary with the person charged with enforcing the law. *Commercial Pictures Corp.* v. *Regents*, (1954) 346 U. S. 587. The application of the statute rests upon the reactions of individual officials to particular drawings or objects.

The clause under consideration has another constitutional infirmity. It punishes the making, possession or distribution of drawings and representations thought to express, or symbolize some concept contrary to the prevailing moral standards. The power of the state cannot be exercised to punish or suppress the expression of an idea

The issuance of a second-class mailing permit is not a guarantee that the holder will not thereafter enter obscene photographs or other obscene material in the mails. It is also difficult to understand why matter sent under third-class permit is not placed in the same category as material entered as second-class matter. And there is no assurance that any work said to be a work of art by "an association of artists" and made by one of its members, will not in fact be obscene. The discrimination in favor of associations of self-styled artists and persons who may receive obscene matter sent under second-class permit is completely irrational and bears no relation to the purpose of Section 2905.34. *Skinner* v. *Okla.*, (1942) 316 U. S. 535, *City of Cincinnati* v. *King*, (1960) 11 Ohio Ops. 2d 433, *Katzev* v. *Los Angeles*, (1959) 341 P. 2d 310.

The Statute is void on its face because in its application, and by its very existence, it inhibits expression

As noted in the preceding discussion, Section 2905.34 authorizes punishment of communications within the protection of the constitution. The possibilities of abuse inherent in the statute renders it void in its entirety. It is settled, as Mr. Justice Reed said in *Winters* v. *New York*, (1948) 333 U. S. 507, 509, that a statute that permits "within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void on its face as contrary to the Fourteenth Amendment. *Stromberg* v. *People of the State of California*, (1931) 283 U. S. 359, 369; *Herndon* v. *Lowry*, (1937) 301 U. S. 242, 258". See also *Smith* v. *California*, (1959) 361 U. S. 147, 152-154; The Void for Vagueness Doctrine in the Supreme Court (1960) 109 U. of Pa. L. R. 67, 81.

Because of the broad sweep and the vagueness of the provisions discussed, the section because it exists, and may be invoked whenever government officials with authority

see fit, constitutes a threat to the exercise of the right of communication. It stands, to borrow Mr. Justice Frankfurter's phrase, as a derelict in the waters. Mr. Justice Murphy wrote in *Thornhill* v. *Alabama* (1940) 310 U. S. 88, 97-98:

> "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

Section 2905.34 does not give fair warning of its prohibitions

Where the terms of a statute restrictive of the right of free expression are so broad and indefinite that one cannot know what it means, or predict the way it will be applied, the statute may be held void on its face without regard to its application in a particular case. The rule is founded on the fundamental principle mentioned before that one may not be punished for a crime unless he is given a reasonable opportunity to avoid committing it. One cannot from a reading of Section 2905.34 or any gloss upon it, guess what conduct is prohibited by the proscription against possessing, lending or giving an immoral article or drawing etc. Such indefiniteness is doubly objectionable in a statute regulating communication for it denies due process and abridges the freedom of the press. *Winters* v. *New York*, (1948) 333 U. S. 507, 509, 515; *United States* v. *Raines*, (1960) 362 U. S. 17, 22.

POINT II

Section 2905.34 of the Ohio Revised Code on its face abridges the freedom of the press and should be declared void in its entirety.

We are not, in the discussion of this point, concerned with the application of Section 2905.34 in this case. The objection presented here is to the evil that the law works by its existence. Generally this Court will pass upon the constitutionality of a statute only as it was applied or construed in,—and to the extent necessary to determine,—the particular case before it. But the general rule is not observed, and unconstitutional applications of the statute that are not directly involved in a case may nevertheless be considered (1) where a statute is unconstitutional in the majority of its intended applications, *United States* v. *Raines* (1960) 362 U. S. 17, 23; or (2) where the statute would in its application have an inhibitory effect on expression, *Smith* v. *California* (1959) 361 U. S. 147; *Shelton* v. *Tucker* (1960) 364 U. S. 479, 488; *Thornhill* v. *Alabama* (1940) 310 U. S. 88, 97; *Herndon* v. *Lowry* (1937) 301 U. S. 242, 264; or (3) where the statute if left standing would be incapable of giving fair warning of its prohibitions, *United States* v. *Raines* (1960) 362 U. S. 17, 24. The statute challenged here falls within each of those exceptions.

Section 2905.34 proscribes in a single sentence without syntax, the mere possession or distribution of an obscene writing or a book *obscene in part*, or a drug or "thing intended for the prevention of conception", and the showing to a minor of a newspaper "*principally* made up of criminal news, police reports or accounts of criminal deeds", and exhibiting "stories of immoral deeds, lust or crime" on

"a street or highway or in a place (building) which may be within view of a minor." Infraction of the law may be punished by imprisonment for a term of from one to seven years in the state penitentiary or by fine of $200 to $2,000, or both. The statute was re-enacted, in substantially its present form in 1953 (Ohio Laws Vol. 125) when the Ohio statutes were revised and recodified in an attempt to eliminate obsolete and inoperative laws, (Page's Ohio Revised Code Ann. Vol. I pp. xix *et seq.*) and it was re-enacted in 1955, Ohio Laws Vol. 126 pp. 575, 577.

The statute incorporates the most objectionable features of a number of other state statutes held repugnant to the Constitution. Each clause of the statute relating to communications has been held violative of the Constitutional guaranties of freedom of expression, or due process of law, or both. It is difficult to believe that the Ohio legislators and their expert advisors were ignorant of the landmark cases holding its provisions unconstitutional, when they enacted and then re-enacted Section 2905.34.

The Statute Is Unconstitutional in the Majority of Its Intended Application

Section 2905.34 is unconstitutional in so many respects, and so much of it is invalid and inoperative, that no part may be given effect. Accordingly, Appellant's conviction under the statute cannot stand. In *Smith* v. *California* (1959) 361 U. S. 147, Mr. Justice Brennan wrote for the Court:

> "It has been stated here that the usual doctrines as to the separability of constitutional and unconstitutional applications of statutes may not apply where their effect is to leave standing a statute patently capable of many unconstitutional applications, threatening those who validly exercise their

challenging or flouting accepted moral standards no matter how offensive to principles of the majority. *Kingsley Corporation* v. *Regents*, (1959) 360 U. S. 684, 689.

Section 2905.34 provides further*

> "No person shall . . . sell, give away or show to a minor a book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication of criminal news, police reports or accounts of criminal deeds or pictures and stories of immoral deeds, lust or crime . . .".

The purpose of the statute obviously is the protection of youth. But the power and obligation of the state to legislate in that area must be exercised rationally and not arbitrarily, and the legislation must bear a substantial relation to that end. *Butler* v. *Michigan*, (1957) 352 U. S. 380. The prohibitions set forth above are completely unreasonable. The statute makes it criminal to show "accounts of criminal deeds" and "stories of immoral deeds". Under the plain language of the section one could be imprisoned for a period of 7 years for giving a copy of Macbeth, or the tales of Edgar Allan Poe, to a student of 17. No distinction is made in the statute between accounts of immoral deeds that are intended to inculcate moral principles, and those that pander to low tastes.

A subdivision of a New York penal statute was declared unconstitutional because of the inclusion of language almost identical with that quoted above, *Winters* v. *New York*, (1948) 333 U. S. 507.** The scope of the New York

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*Though the provisions are of doubtful validity, we are omitting the portion of the statute relating to drugs and contraceptives and are limiting our discussion to the portions governing communication and expression.

**The statute in *Winters* was also aimed at publications tending to stimulate juvenile delinquency. (1948) 333 U. S. at p. 510.

statute had, moreover, been narrowly limited by construction, to publications that "so massed their collection of pictures and stories . . . as to become vehicles for inciting violent and depraved crimes against the person." *Winters* v. *New York*, (1948) 333 U. S. at 514.

The section held unconstitutional in *Winters* punished one who ". . . sells, lends, gives away, distributes or shows . . . any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds or pictures or stories of deeds of bloodshed, lust or crime . . .". Mr. Justice Reed, delivering the opinion of the Court in *Winters* v. *New York*, said of the statute (1948) 333 U. S. 519-20 "It does not seem to us that an honest distributor of publications could know when he might be held to have ignored such a prohibition. Collections of tales of war horrors, otherwise unexceptionable might well be found to be 'massed' so as to become 'vehicles for inciting violent and depraved crimes.' Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained." *Herndon* v. *Lowry*, (1937) 301 U. S. 242, 259.

Mr. Justice Frankfurter, in his dissent in *Winters* v. *New York*, (1948) 333 U. S. 507, 520-22, noted that the majority of the Court by its decision in Winters, also struck down among other statutes, Section 13035 of the Ohio General Code, which was later reenacted as Section 2905.34 of the Ohio Revised Code.*

The final portion of Section 2905.34 provides:

> "No person shall . . . exhibit upon a street or highway or in a place which may be within the view

* Section 13035 of the Ohio General Code is reprinted in full at p. 3a of the Appendix.

of a minor, any such books, papers, magazines or pictures".

The term "such books, papers, magazines or pictures" refers to publications "devoted to" or "principally made up of criminal news, police reports, or accounts of criminal deeds or pictures and stories of immoral deeds, lust or crime". The term "place" as used in the statute includes "any building, erection or . . . any separate part or portions thereof or the ground itself", Ohio Revised Code §3767.01.

The statute makes it an offense to keep any "accounts of crime" (so that it comprehends within its range, all detective stories, such books as Dostoievsky's, Crime and Punishment, books on war crimes and tabloid newspapers featuring reports of crimes) on view at any newsstand that minors occasionally pass. The same prohibitions apply to bookstores, the interior of which, may be observed by children, from the street or from the corridors inside a building. That part of the statute was enacted, presumably for the protection of children, but it enjoins the keeping of such material for sale to adults in places that can be seen by minors. As Mr. Justice Frankfurter said of a similar provision in *Butler* v. *Michigan*, (1957) 352 U. S. 380, 383: "Surely, this is to burn the house to roast the pig". The Court in *Butler* v. *Michigan* said in reversing a conviction under the statute (352 U. S. at 383):

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable

conditions for the maintenance and progress of a free society."

In considering the validity of Section 2905.34 of the Ohio Revised Code on its face, it must be read together with the related Sections 3767.01(c) and 2905.37 of the Ohio Revised Code, which exempt from the prohibitions of Section 2905.34 material *entered* as second class matter in the post office* and works of art *made* and distributed by artists belonging to a non-profit association of artists or by an association (not limited to artists) for the advancement of art. Under the statutory definition paintings by Michelangelo, Picasso, Matisse or Braque are not bona fide works of art because not made by an artist belonging to an association, and one could be prosecuted for possessing or selling them if they were considered obscene.** The constitutionality of Section 2905.34 must be measured as thus modified. *Davis* v. *Wallace*, (1921) 257 U. S. 478 and *Frost* v. *Corp. Commission*, (1928) 278 U. S. 515, 526 in which the Court said, "Where the excepting provision is found unconstitutional the substantive provisions which it qualifies cannot stand." So considered, Section 2905.34 is patently arbitrary and unreasonable and contravenes the equal protection clause of the Fourteenth Amendment.

* Sections 3767.01 (c) and 2905.37 App. pp. 1a, 2a.

** Although that seems to be stretching the probabilities, prints made from Michelangelo's Last Judgment, in the Sistine Chapel were in fact confiscated as obscene by customs authorities, because the genitals of some of the figures were discernible. Paul and Schwartz, Obscenity in the Mails (1957) 106 U. of Pa. L. R. 214, 218. Reproduction of nudes painted by Picasso and others by Matisse were held obscene and therefore non-mailable by the post-office, Paul and Schwartz, Federal Censorship: Obscenity in the Mail, Crowell-Collier (1961) p. 71. The Customs Bureau refused to classify collages (including those made by Braque and Picasso) as bona fide works of art until 1958, Derenberg and Baum, Congress Rehabilitates Modern Art (1959) 34 N. Y. U. L. R. 1228, 1235, 1248.

POINT III

Appellant was convicted of possessing and exhibiting the film "The Lovers", which is not obscene, according to constitutional standards. The judgment of conviction was, therefore, in violation of the First and Fourteenth Amendments.

The Court below found that though the film "The Lovers" was not "hard-core pornography", it was, the Court said commercially exploited "filth", and it added that the exhibitor by showing it, evidenced so little responsibility that he had "no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection". (R. 517; 173 Ohio St. at 258). It is not necessary to comment on the dictum that one must exercise a high degree of responsibility before invoking a constitutional right. It is clear also that seeking economic gain from the sale or distribution of a communication, does not affect one's right to the protection of the Constitution, or the question of whether the communication is obscene. *Burstyn* v. *Wilson* (1952), 343 U. S. 495, 501-502.

The standards for determining whether a work is obscene are set out in *Roth* v. *United States*, (1957) 354 U. S. 476 and *Manual Enterprises* v. *Day*, (1962) 370 U. S. 478. If a film is suppressed as obscene and it does not fall within the definition of that term as outlined in those cases, the First Amendment right of communication is violated. *Smith* v. *California*, (1959) 361 U. S. 147, 152; *Burstyn* v. *Wilson*, (1952) 343 U. S. 495. This Court indicated in *Roth* and in later cases, its intent to limit the material that may constitutionally be suppressed as obscene, to hard-core pornography i.e. "obnoxiously debasing portrayal of sex",—material that taken as a whole appeals to "prurient interest", *and* that is "patently offensive" to current standards

of decency. *Manual Enterprises* v. *Day* (1962), 370 U. S. 478, 483, 486; *Roth* v. *United States* (1957) 354 U. S. 476, at 485; *One, Inc.* v. *Oleson,* (1958) 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield,* (1958) 355 U. S. 372; *Times Film Corp.* v. *City of Chicago,* (1958) 355 U. S. 35; *People* v. *Richmond County News* (1961) 9 N. Y. 2d 578, 586, 589; Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5, 32-35 (1960); Lockhart and McClure, Obscenity Censorship: The Constitutional Issue—What is Obscene, 7 Utah L. Rev. 289, 295 (1961). The Court below conceded, and it will be evident upon viewing the film, that "The Lovers" is not, and it cannot fairly be described as, "hard-core pornography".

The Courts below, although they referred to and recited the criteria outlined in *Roth* v. *United States* (1957) 354 U. S. 476, for judging whether a work is obscene, failed to apply them in this case.

The dominant theme of the film, considered as a whole, does not appeal to prurient interest (See *Roth* v. *United States* 354 U. S. at 489)

Under the rule laid down in *Roth* a work may no longer be judged by the effect of isolated portions. It must be judged as a whole. *Manual Enterprises* v. *Day* (1962) 370 U. S. at p. 487; *Grove Press, Inc.* v. *Christenberry* (1960) 276 F. 2d 433, 437 (2nd Cir.). The so-called "Hicklin test" rule,—under which a work may be judged by the effect of an isolated excerpt—was specifically rejected in *Roth* (354 U. S. at p. 489) and the Court approved instead the following charge of the Trial Court to the Jury: *"The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."*

The Court below judged "The Lovers" by the effect of an isolated portion lasting three of the ninety minutes of the film's running time (R. 517; 173 Ohio St. at p. 28). The Ohio Court found the other eighty-seven minutes of the film deadly-dull (R. 517; 173 Ohio St. at 28). It would appear then that the film was judged on the basis of the isolated sequence objected to, and the effect of the entire film, according to the Ohio Court, was to induce boredom, not lustful desire.

The Film was not judged in accordance with "contemporary community standards." (See *Roth* v. *United States* 354 U. S. at 489)

The prosecution in this case used as the norm, in judging current attitudes, the supposed standards of the people in Cuyahoga County (the geographical limits of the Court's jurisdiction) (R. 61, 73, 154, 156, 179, 180, 181, 236, 259, 268, 291, 323, 367, 433, 485-6.) The Trial Judges declared that in finding that "The Lovers" appeals to prurient interest they were "applying community standards" (R. 501) but they did not indicate the community to which they referred. However, the only evidence in the record that could support a finding of violation of community standards related to the County standards. The evidence admitted with respect to national standards showed that the film was not objectionable or obscene when judged in accordance with the contemporary standards of the people of the nation. (R. 327-8, 468-9, Dft. Ex. K; R. 496, 1334; Dft. Ex. G-a-1, Review in Newsweek Magazine; R. 489, 1330; Dft. Ex. H-1; R. 491, 1331; Dft. Ex. I; R. 493, 1332.) We do not believe that the standards of the particular county in which a dealer in books or films is tried, can constitutionally serve as a guide.

The term "community" is not defined in the opinion of the Court in *Roth*, but it is clear that this Court did not

intend the judgment of material by the singular standards of the people of a city, township or county. The requirement of conformity to the differing standards of each city, county and each rural area of a state would impose an insuperable burden on the distribution or dissemination of communications. *Manual Enterprises* v. *Day* (1962) 370 U. S. 478, at 488.

To the extent that they can be determined or shown (by evidence, for example, of the acceptance of a particular work in other parts of the country) the standards of the nation rather than those of a particular state, should serve as a guide,—even in prosecutions under state law. The traffic in books, magazines and films, in the United States is of necessity nation-wide. Different versions of books or of films cannot be prepared for distribution in different states, and a work designed to conform to the various standards of *all* areas would not be worth distributing. There is no great danger of moral degradation, and no great sacrifice of state sovereignty in acceptance of the nation's standards as the norm. That would not result in greater restriction, for each State is, of course, free to permit greater latitude within its boundaries.

The following comment on §207.10, the model penal statute punishing those who deal in obscene material, in the sixth draft of the ALI Model Penal Code, is instructive in that connection:

> ". . . a book could hardly be obscene in one county of a state if it appeared openly on public library shelves and in book stores throughout the state. And a tribunal in one state is entitled to know that a moving picture or book has circulated elsewhere in the United States, that it has been reviewed in responsible journals there, and, perhaps, that it has been adjudicated to be or not to be obscene. Furthermore, since

> a large part of the responsibility in the area has been assumed by the national government enforcing federal obscenity legislation, a country wide approach is almost unavoidable." A. L. I. Model Penal Code, Tent. Draft No. 6 (1957) p. 44.

Whether the issue of obscenity is to be judged by the mores of the state or the nation, we do not believe that "a lesser geographical framework for judging this issue" may, as it did in this case, constitutionally serve as the standard. *Manual Enterprises* v. *Day* (1962) 370 U. S. at p. 488. Judged by the standards of the people of the United States, or of the people of the State of Ohio, "The Lovers" is not obscene. The film was shown publicly in Toledo and Columbus, Ohio, (R. 326-7, 330) and there was no prosecution of, or interference with, the exhibition in those cities. The film was also shown in major cities in other states throughout the United States (R. 361), and such few attempts as were made to interfere with it were defeated. The United States Customs Bureau (presumably applying the standards of the nation) judged the picture "not obscene" (Dft. Ex. K; R. 496, 1334).

The Exhibition of the Picture "The Lovers" may not be punished as obscene because of its redeeming social importance

The Court in *Roth* v. *United States* (1957) 354 U. S. 476 at 485, limited the application of the term "obscene" so that it may not be held to include works that have social value or express ideas of social import (including "unorthodox ideas" and "ideas hateful to the prevailing climate of opinion"). It is clear that the Court intended to liberate all serious art from the shadow of the censor. Kalven, Metaphysics of The Law of Obscenity, in The Supreme Court Review 11-13 (Univ. of Chicago Press, 1960).

The Court below did not take into consideration the artistic merit of the film. The excellence of the direction, acting and photography of "The Lovers" have been generally acknowledged by those qualified to make such judgments (R. 469). A work of such social value may not be banned as obscene, *Roth* v. *United States* (1957) 354 U. S. at 484, 487.

The question of whether the attacked expression is suppressible within Constitutional standards is ultimately one for this Court. *Roth* v. *United States* (1957) 354 U. S. 476, 479, 497. We believe that a viewing of the film will convince the Court that the picture may not be considered obscene under any constitutionally permissible test.

POINT IV

Section 2905.34 of the Ohio Revised Code infringes the right of communication protected by the First and Fourteenth Amendments and is void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony to possess or exhibit an "obscene" motion picture.

The prevailing opinion in this Court, as expressed in *Roth* v. *United States*, 354 U. S. 476, is that a criminal prohibition against "obscenity" does not violate the right of communication and that the word "obscene" as used in a criminal statute is not unconstitutionally vague. The record in this case furnishes occasion for reconsideration of those rulings. See *Smith* v. *California*, 361 U. S. 147, 155, 167 (concurring opinions of Mr. Justice Black and Mr. Justice Douglas).

Conclusion.

The order appealed from should be reversed, for

1. Section 2905.34 of the Ohio Revised Code is and should be declared void in its entirety, for each of its provisions imposes a restraint upon communications prohibited by the First and Fourteenth Amendments.

2. Section 2905.34 is and should be declared void in its entirety because it infringes the right of communication in punishing the showing of obscene matter, and is void for vagueness.

3. Section 2905.34 of the Revised Code is and should be declared void as interpreted and applied in this case in that it provided for the punishment of the mere possession of an obscene film, and the exhibition of an obscene film, without regard to the question of wrongful intent.

4. The film "The Lovers" is not obscene, judged in accordance with constitutional standards, and the conviction of Appellant was, therefore, in violation of the First and Fourteenth Amendments.

5. The Appellant was convicted and his conviction was affirmed without due process of law.

February 5, 1963

Respectfully submitted,

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On the brief

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APPENDIX.

Ohio Revised Code Section 2905.342. *"Exhibition of obscene movies prohibited; movies inciting disorder or violation of laws prohibited:*

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"(B) Any motion picture film, the exhibition of which has created a public disorder, or from the exhibition of which a public disorder is imminent.

"The exhibition of a motion picture film which teaches or advocates that the violation of any of the criminal laws of the state of Ohio or any of the criminal laws of the United States of America is a proper or desirable course of conduct shall, prima facie, be deemed to create an imminent public disorder for the purpose of initiating the arrest of any person for the violation of this section.

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1962 Supplement, at p. 10.)

Ohio Revised Code Section 2905.37. *"Legitimate publications not obscene:*

"Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article

is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-64.)

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions:*.

"As used in all sections of the Revised Code relating to nuisances:

" 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition, films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37, and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37, 39, at p. 201.)

Ohio General Code Section 13035. *"Disposing of, exhibiting, advertising, etc., obscene literature or drugs for criminal purposes."*

Whoever sells, lends, gives away or exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession for such purpose, an obscene, lewd or lascivious book, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, drawing, representation, figure image, cast, instrument or article of an indecent or immoral nature, or a drug, medicine, article or thing intended for the prevention of conception or for causing an abortion, or advertises any of them for sale, or writes, prints, or causes to be written or printed, a card, book, pamphlet, advertisement or notice giving information when, where, how, of whom or by what means any of such articles or things can be purchased or obtained, or manufactures, draws, prints or makes such article or thing, or sells, gives away or shows to a minor, a book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, of pictures and stories of immoral deeds, lust or crime, or exhibits upon a street or highway or in a place which may be within the view of a minor, any of such books, papers or pictures, shall be fined not less than fifty dollars nor more than two thousand dollars or imprisoned not more than five years, or both (R. S. Sec. 7027).

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In the Supreme Court of the United States

OCTOBER TERM, ~~1962.~~ 63

No. ~~[illegible]~~ 11

STATE OF OHIO,
Plaintiff-Appellee,
against
NICO JACOBELLIS,
Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO.

ANSWER BRIEF OF APPELLEE.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. 164.

STATE OF OHIO,

Plaintiff-Appellee,

against

NICO JACOBELLIS,

Defendant-Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

ANSWER BRIEF OF APPELLEE.

OUTLINE OF THE CASE.

The Appellant was manager of The Heights Arts Theatre at Cleveland Heights, Ohio, since 1955. As such, he was supervisor of the entire physical operation, in charge of advertising, publicity, promotion, and the scheduling of films; and supervisor of personnel, maintenance, repairs, and screening. (R. 465, 482-483.)

With reference to "The Lovers," the motion picture in issue, he arranged for the appearance of advertisements in the November 11, 1959, issue of a local daily afternoon newspaper *The Cleveland News* and in the November 12th issue of the only local morning newspaper *The Cleveland Plain Dealer* containing the following: "When all conventions explode * * * in the most daring love story ever filmed." (R. 478-479, 498.) In addition, he arranged for the insertion of an advertisement in *The Cleveland News* issue of November 12th that carried this language: "One of the most important films of the year. It is very

pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality." (R. 480.) (See Appendix 14.) The Appellant also arranged for the insertion of an advertisement in *The Cleveland Press* (the other local daily afternoon newspaper) issue of November 12th and in *The Cleveland News* issue of November 13th and in *The Cleveland Plain Dealer* issue November 13th with the words: "Something of a sexual revolution appears to be going on in the cinema and Malle (director of 'The Lovers') may well be one of the prophets." (R. 481.) (See Appendices 15, 16 and 17.)

The Appellant privately exhibited "The Lovers" in a screening room on November 10, 1959, to motion picture critics of *The Cleveland Plain Dealer*, *The Cleveland News*, and of *The Cleveland Press*. (R. 467.) He read the review of the film in *The Cleveland Press* on November 11th wherein the critic wrote that the photography was "wholly obscene so far as common decency is concerned." (R. 485-486.)

During the daytime hours of November 12th, a detective captain of the local police department telephoned the Appellant, who affirmed that he intended to begin the public exhibition of the film that same evening, and that, having viewed the movie on two occasions, he could see nothing wrong with it. The motion picture was in fact publicly shown twice that evening to hundreds of persons, among whom at the the first showing was the above-mentioned detective captain. (R. 44-45, 472.) He concluded that the film was obscene.

On the following day, the officer conferred with the local chief of police, the city law director, and the county prosecutor. (R. 46.) Prior to the commencement of the public showings on November 13th, the Appellant read the review of the film in *The Cleveland Plain Dealer* en-

titled "Full Condemnation for 'The Lovers,'" wherein the critic described it as filth, referred to its shockingly nasty climax, mentioned its appeal to the prurient-minded, and called it "a dull picture until it turns to screened pornography, and then it becomes nauseous." (R. 485-486.)

During the second of two showings of the movie under the supervision of the Appellant during the evening of November 13th; at which approximately 350 persons were in attendance, the local police halted the exhibition, confiscated the film, and arrested the Appellant. (R. 49-50, 475.) In due course, he was indicted by the County Grand Jury for (1) knowingly having in his possession on November 13, 1959, an obscene, lewd, and lascivious motion picture film entitled *Les Amants*, "The Lovers," and (2) knowingly exhibiting on the same date the said film. The Grand Jury viewed the movie before returning the indictment.

The three-judge trial court, the three-judge district appellate court, and the seven-judge highest court of the state subsequently saw the picture.

Witnesses at the Appellant's trial testified that "The Lovers," taken as a whole, has sex as its dominant theme; it deals with that theme in such a manner as to arouse lustful thoughts and desires in the average person, taking into consideration the contemporary community standards; the whole picture is directed toward the sexual expression; in the bedroom scene, the leading female character was experiencing a sexual stimulation and gratification (an orgasm); it was shocking; the sex act performed was abnormal; and that the movie came out of the "New Wave" of French directors who are exploiting sex, violence, and perversion on the ground that such subjects are the only ones that are current money makers. (R. 121-125, 134, 149, 161-162, 182-184, 213-214, 218, 238, 279.)

It was further testified that the entire purpose of the film was to lead up to one scene; the rest was merely *decor* to enable people to view it and not be altogether ashamed to view it; the dominant theme of sex was manifested in many instances, including the female lead's costuming, the action with the male lead in the boat scene, the disrobing of both man and woman, and the sequences in the bathtub and on the bed. (R. 213, 214.)

Before being permitted to be exhibited anywhere in the state of New York, the movie was "cut." (R. 330-338, 376.) It underwent deletions at the hands of the theater manager in Memphis, Tennessee. (R. 378.) Only the censored version was permitted to be shown in Providence, Rhode Island, and in Boston, Massachusetts. (R. 378.) Showings were stopped by the police in Portland, Oregon, and in Dayton, Ohio. (R. 336, 361.) The Dayton action led to criminal prosecution in which the theater manager was found guilty of exhibiting obscenity, but, on appeal, was discharged when the Supreme Court of Ohio found the *non-scienter* misdemeanor statute involved in that case to be unconstitutional. *State v. Warth*, 173 Ohio St. 15, 179 N. E. 2d 772. (See Appendix 10.) The film was not permitted to be shown in Virginia or in Maryland, where requests for deletions in the movie had not been complied with by the owners. (R. 377-378.)

The obscenity of the film is discussed in the Ohio court opinions at Appendices 2, 3, and 4, written by judges who saw the motion picture as part of the evidence. Similarly, Chief Judge Campbell of the United States (Northern) District Court of Illinois, Eastern Division, pointed out the obscenity of "The Lovers" in *Zenith International Film Corp. v. City of Chicago, Ill.*, 183 F. Supp. 623, at pages 635-6. (See Appendix 12.)

POINT I.

Section 2905.34 of the Ohio Revised Code does not violate the federal constitutional guarantees of freedom of communication. A conviction thereunder is not a denial of due process. It does not punish the mere private possession of obscene material without regard to the nature and purposes of the possession.

As is pointed out elsewhere, the instant case is clearly distinguishable from *State v. Mapp,* 170 Ohio St. 427, 81 S. Ct. 1684, reversed on grounds other than obscenity in *Mapp v. Ohio,* 367 U. S. 643, 6 L. ed. 2d 1081. *Mapp* concerned the *mere* knowing possession of control of obscenity; the instant *Jacobellis* case involves the knowing possession or control of obscenity *for the purpose of public exhibition.* Even *State v. Mapp, supra,* did not foreclose the ban on possession for the purpose of exhibition, as will be seen from the opinion of Judge Taft (170 Ohio St. 427), *supra,* at pages 429, 431, and 432:

> "Defendant offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home; that, when she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them; that, in doing so, she found these lewd and lascivious books and pictures and packed them in a box and one of her suitcases with his other belongings *with the purpose of storing them until he came for his belongings; and that she never looked at these books and pictures again before they were seized by the police.*" * * *
>
> "The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. ed. 2d, 2211. That annotation does not indi-

cate that there is any case decided in a court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited, as it was under Section 2905.34, Revised Code (formerly Section 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even *where the possessor does not have a purpose of again looking at the books or pictures;* and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her *evidence that she had innocently acquired possession of these articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner* * * *

"If, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for her * * *" (Emphasis supplied.)

In *Alberts v. California,* 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304, the constitutionality of a state statute and a conviction thereunder for lewdly keeping for sale obscene and indecent books and for writing, composing, and publishing an obscene advertisement of them were sustained. *A fortiori,* the constitutionality of an Ohio statute prohibiting the knowingly possessing and controlling and exhibiting of an obscene motion picture film and a conviction thereunder for knowingly possessing and controlling the obscenity *for the purpose of exhibition* and the actual exhibiting thereof are sustainable. The generic

concept of *possession* includes within its ambit the species of possession *for the purpose of exhibition*. And that is the gist of the offense at bar. When the Ohio Legislature amended Section 13035, General Code (now Section 2905.34, Revised Code) in 1939, it assuredly did not intend to remove the prohibition against *possession for the purpose of exhibition*, a "purpose of distribution, commercial or otherwise," as was so aptly phrased by the dissenting Judge Herbert at page 438 of *State v. Mapp*, 170 Ohio St. 427, *supra*.

The prevailing and authoritive interpretation of Section 2905.34 with reference to the instant case is to be found in *State v. Jacobellis*, 173 Ohio St. 22, 179 N. E. 2d 777, and *State v. Wetzel*, 173 Ohio St. 16, 179 N. E. 2d 773. (See Appendices 2 and 11.) At the time that the trial court ruled upon the Appellant's demurrer, as mentioned at page 5 of his jurisdictional statement, the authoritative interpretation was *State v. Mapp, supra, which did not and does not militate against or contradict the interpretation in State v. Jacobellis*, 173 Ohio St. 22, *supra*, or *State v. Wetzel, supra*. Specifically in point with the facts of the case at bar are *Jacobellis* (173 Ohio St. 22) and *Wetzel* on the question of the possession of obscenity. *Mapp* was generally in point.

In *Mapp v. Ohio, supra*, there can be little doubt that neither Mr. Justice Stewart nor Mr. Justice Harlan was contemplating a case of *possession for the purpose of exhibition* when the former, at page 672, wrote with reference to the latter at page 686:

"* * *

> "I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of

> Mr. Justice Harlan, not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment.' "

There was no attempt by the Ohio Supreme Court to re-define a statutory crime, after the defendant had been found guilty, in order to validate the conviction, as claimed by the Appellant at page 23 of his brief, citing *Lanzetta v. New Jersey*, as his authority in point. In the first place, *State v. Mapp, supra,* did not exclude application of Section 2905.34 to a possession-for-exhibition case. And, secondly, *State v. Jacobellis,* 173 Ohio St. 22, *supra,* as well as *State v. Wetzel, supra,* validly applied the same Section to a possession-for-exhibition set of facts. Finally, *Lanzetta v. New Jersey, supra,* did not strike down a state statute *because* it had been defined by an appellate court, but because the statute was vague, indefinite, and uncertain *even after it had been so defined.* There can be no question of "retroactive effect" in the construction of the statute for, if at all, the statute, as interpreted by Ohio's highest court in the *Jacobellis* (173 Ohio St. 22) and *Wetzel* cases, is more restrictive than it was in *State v. Mapp, supra.* Since Section 2905.34, among its provisions, prohibits exhibition of an obscene motion picture film, the interpretation of the provision banning possession and control of an obscene moton picture film in such a way as to require that such possession or control be for the purpose of exhibition, for example, is not prejudicial to an accused. It requires the prosecution to prove purpose, and that beyond a reasonable doubt. Under *Hebert v. Louisiana,* 272 U. S. 312, 71 L. ed. 270, 47 S. Ct. 103, whether state statutes shall be construed one way or another is a state question, the final decision of which rests with the courts of the State. At pages 316-317, this honorable Court observed:

"* * * The due process of law clause in the Fourteenth Amendment does not take up the statutes of the several States and make them the test of what it requires; nor does it enable this Court to revise the decisions of the state courts on questions of state law. What it does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the States and do not depend upon or vary with local legislation. * * * The Supreme Court of the State having held that the two statutes must be taken together in determining the penalty intended we must accept that conclusion as if written into the statutes themselves. * * * All that would be open in this Court under the due process clause is whether the State had power to impose the penalty fixed by the statutes as thus construed. * * * That the State had such power is not questioned, but only that the statutes rightly construed show that the power has been exercised. On this question, as we have said, the decision of the Supreme Court of the State is controlling."

The so-called "attempted change by the Ohio Supreme Court in the elements of the crime of which Appellant was convicted" (as claimed by the Appellant) is no *change*, nor is it an *attempted change* in the elements prejudicial to the Appellant. After *State v. Mapp*, *supra*, and before *State v. Jacobellis*, 173 Ohio St. 22, *supra*, and *State v. Wetzel*, *supra*, he was less free than he was after the *Jacobellis*, 173 Ohio St. 22, and *Wetzel* cases: his possession of obscenity *regardless of purpose* fell within the prohibitions of Section 2905.34. Now, purpose must be inquired into. The Appellant cannot successfully claim that the explication of *possession* and *control* in the

Jacobellis, 173 Ohio St. 22, and *Wetzel* cases denied him either the opportunity to avoid offending the law or the opportunity to prepare his defense against the charge of violating it.

The Appellant's possession and control of the motion picture film was not a "mere private possession," but a possession and control highly-publicized by the Appellant himself. *State v. Mapp, supra.*

To make effective the prohibitions against the selling, lending, giving away, exhibiting, or publishing of obscenity, as provided for in Section 2905.34, the possession and control of obscenity for such purposes should be proscribed. Among the ultimate objectives of bringing obscene material into being are the selling, lending, giving away, exhibiting, and publishing. Since the possession and control of obscenity in the instant case were for the purpose of exhibition, the question as to whether or not the application of Section 2905.34 was a valid exercise of the police power should be determined in the light of the facts of the case, not on the basis of a non-existent "mere" possession. The statement of Professor Paul A. Fruend, quoted in another connection in *Kingsley Books, Inc. v. Brown*, 354 U. S. 436, 1 L. ed. 2d 469, 77 S. Ct. 1325, is appropriate here: "What is needed is a pragmatic assessment of its operation in the particular circumstances."

Here, the defendant procured the film for exhibition. He held a private showing for the benefit of local newspaper motion picture critics. He inserted highly-suggestive advance advertisements in the daily newspapers. The police department, having been put on notice by such advertisements, conferred with him about the propriety of the exhibition of the film. The defendant thereafter exhibited the film publicly twice that evening. The advertisements continued. The motion picture was being exhibited

the following evening (for the second time that evening) when the defendant was arrested and the showing was stopped.

This case is clearly distinguishable from *State v. Mapp, supra.* The privacy of the defendant's home and of his own library is not an issue. He was not a mere custodian of the obscene material. The seizure was not unreasonable. Well in advance of his arrest the defendant had knowledge of the contents of the film, yet he persisted in the possession, arranged for advertisements, and proceeded to exhibit. No proximate or remote effect upon free speech or free press is involved.

In *Smith v. California,* 361 U. S. 147, we may logically infer that, if the element of *scienter* had been required, the ordinance of the City of Los Angeles would have been upheld. It is interesting to note that, inter alia, that same ordinance made unlawful the possession of an obscene motion picture film *in any place where motion pictures are exhibited*—a regulation which aptly applies to the fact situation in the instant case.

POINT II.

Section 2905.34 of the Revised Code does not on its face abridge the freedom of press and should not be declared void in its entirety. Further, the question as set forth in the Appellant's brief designated "Point II" was not set forth in the jurisdictional statement nor is it fairly comprised therein.

Rule 15, par. 1 (c) (1) provides in pertinent part "only the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the Court."

On page 3 of the jurisdictional statement the Appellant sets forth "(c) the questions presented by Appeal."

Questions Nos. (1), (2) and (6) present questions concerning "Section 2905.34 of the Revised Code * * * *as applied in this case.*"

Question No. (3) presents a question concerning whether the trial court judged the film obscene in accordance with standards in conflict with those prescribed by this Court.

Question No. (4) presents a question concerning whether the Appellant was twice convicted and punished under Section 2905.34.

Question No. (5) presents a question concerning whether Section 2905.34 as modified by related statutes denies equal protection of laws.

Now, for the first time, the Appellant raises the question of the entire statute, not having first presented the same in his jurisdictional statement. As per Rule 15, par. 1 (c) (1), the Court should not consider this question on Point II.

In arguing that Section 2905.34 of the Ohio Revised Code should be declared void in its entirety, the Appellant argues that "*the statute is unconstitutional in the majority of its intended applications*" and then proceeds to speculate and to theorize as to its intended applications. It is not the function of the Court to pass upon hypothetical cases but rather to restrict itself to the facts and the law of the case at bar.

The constitutionality of a statute must not be tested in the abstract, without reference to its application in the case at hand: litigants may challenge the constitutionality of a statute only in so far as its affects them. *Fleming v. Rhodes*, 331 U. S. 100, 91 L. ed. 1368, 67 S. Ct. 1140; *State v. Harriss*, 347 U. S. 612, 98 L. ed. 989, 74 S. Ct. 808.

Neither the United States Supreme Court nor any other federal Court has jurisdiction to pronounce any statute, either of a State or of the United States, void because irreconcilable with the Constitution, except as it is

called upon to adjudge the legal rights of litigants in actual controversies. *U. S. v. Raines*, 362 U. S. 17, 4 L. ed. 2d 524, 80 S. Ct. 319.

The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases. *U. S. v. Raines, supra.*

Exceptions to the general rule are noted. However, the statute in question does not come within these exceptions.

The Appellant, at page 26 of his brief, states as to exceptions:

> "(1) where a statute is unconstitutional in the majority of its intended applications, *United States v. Raines* (1960) 362 U. S. 17, 23;"

The proper exception, appearing in Headnote 12 of *U. S. v. Raines, supra,* is as follows:

> "Where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and can fairly be said that it was not intended to stand as valid, on the basis of fortuitous circumstances, only in a fraction of the cases it was originally designed to cover."

This statute, Section 2905.34 of the Revised Code, has not been declared unconstitutional in any of its applications, let alone the vast majority of the same; hence it does not come within the above exception.

> "(2) where the statute would in its application have an inhibitory effect on expression, *Smith v. California* (1959), 361 U. S. 147; *Shelton v. Tucker* (1960) 364 U. S. 479, 488; *Thornhill v. Alabama* (1940) 310 U. S. 88, 97;"

Smith v. California, supra, is distinguished for the statute in question did not provide for nor require scienter.

Shelton v. Tucker, supra, is not applicable for the Court found that the unlimited and indiscriminate sweep

of the statute made it unconstitutional in its application to the facts before it.

The case at bar does not come within the exception of the *Thornhill* case for the finding against the defendant was general, there was no specification of the evidence.

Herndon v. Lowry, 301 U. S. 242, is distinguished for the Court found the statute to be "so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence."

> "(3) where the statute if left standing would be incapable of giving fair warning of its prohibitions."

The Appellant states the third exception as a rule of *U. S. v. Raines*. This is just not the fact. The quotation is:

> "The District Court relied primarily on U. S. v. Reese, 92 U. S. 214, 23 L. ed. 563, *supra*. As we have indicated that decision may have drawn support from the assumption that if the court had not passed on the statute's validity in toto it would have left standing a criminal statute incapable of giving fair warning of its prohibitions. But to the extent Reese did depend on an approach inconsistent with what we think the better one and the one established by the weightiest of the subsequent cases, we cannot follow it here."

Section 2905.34 provides in part:

> "No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, *or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles*, advertisements, photographs, * * *." (Emphasis supplied.)

Clearly, this section provides that it shall be unlawful for one to knowingly possess or exhibit an obscene book, magazine, etc.; then the section repeats the language "*or book, pamphlet, paper, magazine*" and adds thereto "*not wholly obscene but containing lewd or lascivious articles, advertisements, photographs* * * *."

The clear purpose of this section is to cover the situation on a quantity basis. The book, pamphlet, paper, or magazine may not be dominantly obscene on a quantity basis, but on a quality basis it meets the test.

The argument of the Appellant on this point amounts to saying that if a book of one hundred pages contained forty-nine pages of absolute hard core pornography it would not be obscene because fifty-one pages were otherwise.

The dominant theme test is not a quantity but a quality test.

Section 2905.34 in part as set out in the Appellant's brief at page 28 is incomplete.

Set out on page 28 by the Appellant:

> "No person shall knowingly sell, lend, give away * * * or have in his possession or under his control an * * * drawing, representation, figure, imagine, cast, instrument or article of an indecent or immoral nature * * *."

That portion of Section 2905.34 in fact provides:

> "No person shall knowingly sell, lend, give away, *exhibit* * * * or have in his possession or under his control an *obscene*, *lewd*, or *lascivious* book, magazine * * * or book, pamphlet, paper, magazine not wholly obscene but containing *lewd or lascivious* * * * drawing, representation, figure, image cast, instrument or article of an indecent or immoral nature * * *." (Emphasis supplied.)

The descriptive term is "*lewd or lascivious*" and not simply "*indecent or immoral.*"

Again, on page 30 of the Appellant's brief, he misstates the provision of 2905.34.

The Appellant, on page 30 of his brief, states as follows:

> "Section 2905.34 provides further
>
> 'No person shall * * * sell, give away or show to a minor a book, pamphlet, magazine, newspaper, story paper or other paper devoted to the publication of criminal news, police reports or accounts of criminal deeds or pictures and stories of immoral deeds, lust or crime * * *.'"

The section in fact reads "No person shall *knowingly* sell * * *."

Butler v. Michigan (1957), 352 U. S. 380, is not applicable to Section 2905.34 of the Ohio Revised Code.

In the *Butler* case, *supra*, the appellant was convicted because the Michigan statute made it an offense for him to make available for the general reading public a book that the trial judge found to have a potentially deleterious influence upon youth.

The Ohio statute in question does not prohibit the possession of such material nor the sale of the same to an adult. In the *Butler* case the arrest and conviction grew out of a sale to an adult.

In *Strohm v. People*, 160 Ill., 582, 43 N. E. 622, a statute to suppress exhibiting to any minor child a publication of this character was upheld.

Under the provisions of paragraph 2(c) of Rule 10 this Honorable Court may not consider the question raised on page 33 of Appellant's brief. It was not raised in the notice of appeal, contrary to the provisions of paragraph

1 (c) (2) of Rule 15. While a seemingly similar issue was raised in the notice of appeal, this question is in addition thereto, is different in substance, and is not fairly comprised therein.

Despite the foregoing, and out of an abundance of caution, there follows a discussion of this question to show that Section 2905.34, in light of related statutes, does not deny equal protection of the laws, nor does it authorize punishment without due process of law.

The Appellant's citing of *City of Cincinnati v. King*, 11 Ohio Ops. 2d 433, 84 Ohio Abstract 84, 168 N. E. 2d 633, is apparently intended to draw attention to a finding of a municipal trial court judge to the effect that the state statute Section 2905.34 was unconstitutional, thus sustaining the local ordinance against the charge that it made a misdemeanor of the same acts proscribed by the state felony statute. Suffice it to say that no higher court has looked to this opinion as a valid precedent.

A reasonable interpretation of Ohio Revised Code Sections 2905.37 and 3767.01 (c), set forth at Appendices 6 and 7, reveals that Ohio Revised Code Section 2905.34, set forth at Appendix 5, of which the Appellant was convicted of violating, applies uniformly to all persons knowingly possessing, controlling, or exhibiting obscenity.

The provisions of Section 2905.37 relative to a "work of art" were a safeguard in arriving at a proper understanding, prior to *Roth v United States*, 354 U. S. 476, of what was meant by the expression "obscene, lewd, or lascivious * * * motion picture film * * *" prohibited by Section 2905.34. No association of artists or for the advancement of art is given license to exhibit or possess or have under its control an obscene motion picture film. No such association is exempted from the operation of Section 2905.34. An obscene motion picture film is not a "bona fide" work of art.

Section 2905.34 of the Revised Code was last amended by the General Assembly in 1955, almost two years prior to the enunciation of the standards for judging obscenity appearing in *Roth v. United States, supra.* Confusion had reigned over a long period of time as to what constituted obscenity and wherein it could be distinguished from a true work of art. Oftentimes, works of art portraying nudity and sex were erroneously identified with obscenity. *Roth* solved the then-existing problem by its definition and description of obscenity and its setting of the standards by which obscenity might be judged. However, before *Roth*, the Ohio General Assembly felt called upon to make some necessary differentiation between obscenity and works of art. Section 13037 of the General Code (predecessor to Section 2905.37 of the Revised Code) was amended accordingly in 1943; it was specifically spelled out that obscenity was not included in "Bona fide works of art."

Section 2905.37 of the Revised Code makes reference to a "bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44 inclusive, of the Revised Code * * *." It follows, therefore, from the provisions of that series of statutes just mentioned, that such bona fide association is one whose proven aims are in conformity with a well-ordered society wherein the following crimes (and conduct leading to such crimes) are suppressed: Obscene language, nudism, obscene literature, obscene motion picture films, obscene matter, immoral literature, immoral pictures, immoral exhibitions, lewd pictures, bigamy, sodomy, adultery, fornication, incest, seduction, prostitution, pandering, procuring, white slavery, and indecent exposure. In addition, such "bona fide association" must not have sympathy with sexual

items or matters which are llicit, lewd, obscene, indecent, immoral, disorderly, indiscriminate, unchaste, licentious, filthy, impure, lustful, corrupt, profane, and improper.

In view of the foregoing, how can it be truthfully said that an association of artists or an association for the advancement of art is exempt from the penalties of Revised Code Section 2905.34? How does it appear that the legislature approves traffic in obscenity by artists?

It might be noted in passing that Section 2905.37 of the Revised Code bears out the proposition that works of art are legitimate, and that legitimate works of art are not obscene.

The statute provides that "Sections 2905.33 to 2905.36, inclusive, of the Revised Code *do not affect* * * * the publication and distribution of bona fide works of art * * *." The terms of the statute are well chosen: An obscene motion picture film, not being a work of art, does not affect the publication and distribution of bona fide works of art.

A workable and adequate standard has been established by a statute within definite valid limits and with limitations for guidance. A policy has been laid down. No lack of uniformity or discrimination results. 11 *Am. Jur.* 955-56, Sec. 240. Section 2905.37 of the Revised Code provides that the works of art be bona fide; that they be made, published, and distributed by a bona fide association of artists or an association for the advancement of art; that such association be a non-profit organization; and that the demonstrated purpose of such organization does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, *suppressing the evils (and the means tending to result in such evils) enumerated in the fourth paragraph above, and inimical to the type of sexual items and matters set forth in the same paragraph.*

Even had the movie "The Lovers" been made, published and distributed by an art association, the subsequent exhibition of the film by the Appellant would still be criminal because of the movie's obscenity. A *bona fide* work of art is not an obscene motion picture film. Nor is an obscene motion picture film a *bona fide* work of art.

The provisions of Section 3767.01 relative to publications entered as second class matter by the post-office department are not discriminatory or unreasonable. They bear direct relation to the purpose of Section 2905.34.

Mailable matter is divided into four classes. Second class matter consists of all newspapers and other periodical publications. Further requirements for admission to second class are that such newspapers and other periodical publications must be issued at stated intervals, as frequently as four times a year; they must bear a date of issue and be numbered consecutively; they must be formed of printed sheets; and they must have a legitimate list of subscribers (39 U. S. C. Secs. 221, 224, 226). Accordingly, the provisions of Section 3767.01 of the Revised Code pertaining to "any newspaper, magazine, or other publication entered as second class matter by the post-office department" do not apply to the motion picture film "The Lovers." Neither the Appellant in the instant case, nor any other motion picture possessor, controller, or exhibitor is affected in any respect. Where is the claimed power of the Post Office Department to exempt any possessor, controller, or exhibitor of an obscene movie from Ohio the penalties of Section 2905.34 of the Revised Code?

Irrespective of the fact that a motion picture film may not be admitted to the second class, the "post-office department" provision of Section 3767.01 of the Revised

Code is a reasonable and constitutional narrowing of the application of Section 2905.34 of the Revised Code.

> "The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection clause of the Fourteenth Amendment. This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. * * *
>
> "The existence of the power of classification to suppress an evil is not to be denied simply because some innocent articles or transactions may be found within the prescribed class." (12 *Am. Jur.* 162-3, Sec. 484.)

It can validly be opined that the General Assembly of Ohio, in amending Section 6212-1 of the General Code (antecedent to Section 3767.01 of the Revised Code) in the year 1943 felt that there was a sufficient control of obscenity on a federal level as far as second class mail was concerned and that Ohio had little or no problem in that area. If such feeling on the part of the Legislature existed, then the separate classification of such publications is reasonable and valid. Obscenity is not mailable in *any* class. Its mailing is subject to a heavy fine and lengthy imprisonment (18 U. S. C. Sec. 1461). And the second-class mail privileges may be suspended or annulled after a publication has been accorded them (39 U. S. C. Sec. 232). The grant of second class mail privileges to a newspaper or other periodical publication is no guarantee that issues of that newspaper or publicati n subsequent to the grant are not obscene. Hence the Federal provisions relative to the criminal prosecution of obscenity and the suspending or annulling of the grant.

A State may withhold provision for the punishment of a person subject to the Federal Obscenity Laws. The Ohio constitutional provision as to uniformity of operation does not preclude reasonable classification (*State ex rel. v. Thrasher*, 130 Ohio St. 434, 200 N. E. 468, 5 Ohio Ops. 55).

Because the General Assembly saw fit to rely upon the enforcement of the federal law regarding obscenity and the activities of the post office department relative to second class mail, it cannot be construed that Ohio was protecting obscenity in that field. The post office department has regulations making nonmailable obscene matter at any time; the second class mail privilege could be revoked if it found that succeeding issues of a publication were obscene, although the original issue or issues (upon which the privilege had been granted) were not obscene; persons who violated the regulations by mailing obscene material could be reported to the federal authorities for criminal prosecution on a federal level.

The Federal Constitution does not require that state laws shall cover the entire field of proper legislation in a single enactment. There is no constitutional requirement that regulation must reach every class to which it might be applied. It is not unconstitutional merely because it is not all-embracing, and does not include all the evils within its reach. The state may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses. The legislature is not bound to extend a police regulation to all cases which it might possibly reach. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. The state may legislate in such a manner even though the forbidden act does not differ in kind from those that are allowed, because it is free to recognize degrees of harm and

may confine its restrictions to those classes of cases where the need is deemed to be clearest. Hence, it is not enough to invalidate a law that others may do a thing which is equally harmful and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The rule is also well settled that legislation may recognize degrees of evil without being arbitrary, unreasonable, or in conflict with the equal protection clause of the Fourteenth Amendment. This principle is sometimes stated in the concept that the power of a state to classify objects of legislation may be determined by degrees of evil or exercised in cases where detriment is specially experienced. 12 *Am. Jur.* 160-163, Sec. 484.

Finally, the attack upon the constitutionality of Section 2905.34, in light of the provisions of Sections 3767.01 (c) and 2905.37, was thoroughly aired in the trial court, the district court of appeals, and the highest court of the state. The statute withstood the charges of arbitrariness, unreasonableness, and discrimination.

Section 2905.34 does give fair warning of its prohibitions.

> "The federal obscenity statute makes punishable the mailing of material that is 'obscene, lewd, lascivious, or filthy * * * or other publications of an indecent character.'"

The California statute makes punishable, inter alia, the keeping for sale or advertising material that is "obscene or indecent."

Many decisions have recognized that those terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process * * *. "The Constitution does not require impossible standards;" all that is required is that the language "conveys sufficiently

definite warning as to the proscribed conduct when measured by common understanding and practises * * *." *Roth v. U. S.*, 354 U. S. 476, 491-492.

The words applied in Section 2905.34 according to proper standards for judging obscenity give adequate warning of the conduct proscribed and mark the boundaries sufficiently distinct for judges and juries fairly to administer the law and for citizens to avoid violating the law.

POINT III.

Appellant was convicted of possessing and exhibiting the film "The Lovers," which is obscene, according to constitutional standards. The judgment was not in violation of the First and Fourteenth Amendments.

Despite the provisions of paragraph 1 (b) (ii) of Rule 15 of this Honorable Court, the jurisdictional statement and the brief omit mention of the following pertinent facts:

1. Section 1 of Rule XX of the Rules of Practice of the Ohio Supreme Court authorizes the making of an application for rehearing of any cause within fourteen days after the announcement of a decision. (See Appendix 8.)

2. On January 22, 1962, the Ohio Supreme Court was informed in writing by the then-attorney for the Appellant that he, the attorney, intended to apply for a rehearing of the decision of January 17, 1962, now sought to be reviewed, and, further, that the application for rehearing, together with supporting brief, would be submitted to that Ohio Court on or before January 31, 1962.

3. On January 30, 1962, the same attorney for the Appellant informed the Ohio Supreme Court in writing that he was thereby withdrawing his intention to apply for such a rehearing.

In light of the foregoing, it is apparent that the Ohio Supreme Court was given no opportunity to pass judgment upon Point III, a ground on which the jurisdiction of this Honorable Court is invoked.

Jurisdiction of this honorable Court is sought to be invoked by means of appeal under the provisions of Title 28 of the United States Code, Section 1257 (2), relative to a final judgment by the highest court of Ohio wherein was drawn into question the validity of an Ohio statute on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

At no time was there raised in either (1) the trial court, (2) the intermediate appellate court, or (3) the highest Ohio court, the claim that:

> "* * * the trial court in convicting Appellant, and the court below in affirming the conviction, of possessing and exhibiting an obscene film, judged the film obscene in accordance with standards in conflict with those prescribed by this Court * * *"

In specific negation Point III was not raised at the conclusion of the trial, on argument to the trial court, nor was it argued on appeal to the Court of Appeals of Cuyahoga County, or by assignment of error on the appeal to the Ohio Supreme Court.

Nevertheless, as will be seen from a perusal of the unanimous memorandum opinion of the three-judge trial court (Appendix 4), the unanimous affirming opinion of the three-judge County Court of Appeals (Appendix 3) (*State v. Jacobellis*, 175 N. E. 2d 123), and the opinion of six of the seven judges of the Ohio Supreme Court (Appendix 2), each of these state courts judged the film on the basis of those standards previously enunciated by this Honorable Court, especially reflected in *Roth v. United States*, *supra*, together with *Alberts v. California*, *supra*.

The dissenting jurist in the highest Ohio court in *State v. Jacobellis*, 173 Ohio St. 22, 179 N. E. 2d 777, wrote no opinion. He was in poor health at the time of oral argument before the Ohio Supreme Court and also when that court rendered its judgment of affirmance.

Nothing in the judgment or in the opinions of this Honorable Court relative to *Manual Enterprises, Inc. v. Day*, 370 U. S. 478, 8 L. ed. 2d 639, 82 S. Ct. 1432, militate against the obscenity of "The Lovers," a motion picture which is so offensive on its face as to affront current community standards of decency.

The trial court, in convicting the Appellant, judged the film in accordance with the standards set forth in *Alberts v. California, supra*, as will be seen in Appendix 4.

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* * * *. *'Les Amants'* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. * * *"

As pointed out elsewhere, *Roth* and *Alberts* were decided together.

The district court of appeals utilized the same standards, as appears in Appendix 3.

> "The trial court, in finding the defendant guilty as charged, was governed by the standards defined and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving

picture film, 'Les Amants' we agree with and adopt the same as part of our opinion in this case * * *." (At this point, the higher court set forth *verbatim* the contents of Appendix 4 almost in its entirety.)

The highest Ohio court, too, with six of its seven judges concurring as to the obscenity of the film, also wrote *inter alia*:

"The definition which has now become classic was laid down in *Roth v. United States, supra*, as follows, at page 489 * * *

"Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene * * *

* * *

"* * * The facts were found by three judges sitting as triers of the facts who applied the standards prescribed in *United States v. Roth, supra*, and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

"This court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The Lovers) was not hard-core pornography, *i. e.*, filth for filth's sake. It was worse. It was filth for money's sake. * * *"

Further evidence that the Ohio courts judged the film obscene in accordance with standards *in conformity* with those prescribed by this Honorable Court is the fact that the Appellant, in his brief filed in the Ohio Supreme Court, criticized *Roth v. United States, supra*, found fault with its definition of "obscenity" and the standards by which it should be judged, cited its rejection by some state courts,

and claimed that *Roth* is not binding upon the Constitution of the State of Ohio. *The Appellant requested the Ohio Supreme Court to reject the test* announced in *Roth* for the reason that it was *unconstitutionally vague, impractical, and unworkable!* (See Appendix 9.)

Judge Radcliff, in writing the opinion of the Ohio Supreme Court in *State v. Jacobellis*, 173 Ohio St. 22, *supra*, (Appendix 2) set forth his personal position in the case:

> "At the outset it is well to recall that an opinion of this Court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case." * * *

Now, the only fair and reasonable interpretation of Judge Radcliff's language that "The Lovers" was not hard-core pornography (filth for filth's sake), that it was worse because it was filth for money's sake, is this: the film was hard-core pornography *and more*. The film, suppressed as obscene, fell squarely within the definition of that term outlined in *Roth* and as recently outlined in *Manual Enterprises, supra*. In this connection, the cases of *Burstyn v. Wilson*, 343 U. S. 495, and *Smith v. California*, *supra*, are not violated.

No valid parallel may be drawn between the instant case and *One, Inc., v. Olesen*, 241 F. 2d 772, 355 U. S. 371, 2 L. ed. 2d 352, 78 S. Ct. 364; *Times Film Corp. v. City of Chicago*, 244 F. 2d 432; 355 U. S. 35, 2 L. ed. 72, 78 S. Ct. 115; and *Sunshine Book Co. v. Summerfield*; 128 F. Supp. 564; 249 F. 2d 114; 355 U. S. 372, 2 L. ed. 352, 78 S. Ct.

365. It is apparent from reading the opinion in *One*, as enunciated by the appellate court, that the now prevailing standard for judging obscenity was not followed. Firstly, the legal consideration of the fact situation at that time antedated by some months the *Roth* decision, and failed to anticipate its rationale. Secondly, it appears affirmatively that the said lower court did not have in mind the dominant theme of the material taken as a whole, its appeal or prurient interest to the average person, and the contemporary community standards. Hence, this Honorable Court, when it considered *One* several months after the *Roth* case, was called upon to reverse.

The above analysis with reference to *One* applies with equal vigor to the *Times* case.

Although the *Sunshine* decision in the appellate court postdated by some months the *Roth* case, the then and now prevailing standard for judging obscenity was not applied by the appellate court. That court did not apply it in its own appraisal of the allegedly obscene material. And it also erred in finding that the lower district court had followed the spirit of the *Roth* decision. Once again, this Honorable Court was obligated to reverse.

As both the intermediate appellate court and the trial court in the instant case set forth at Appendices 3 (175 N. E. 2d 123) and 4.

* * *

> "In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted,

and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. *After the narrative has reached this carefully built-up and long-anticipated climax, it scurries to a hasty conclusion.*

"*In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.*" (Emphasis supplied.)

* * *

In view of Judge Radcliff's opinion setting forth that "Les Amants (The Lovers) was not hard-core pornography, *i.e.*, filth for filth's sake," that "(i)t was worse," and that "(i)t was filth for money's sake," it can be seen that there is no basic conflict between the above-quoted language of the intermediate appellate and trial court and that of the Ohio Supreme Court, speaking through Judge Radcliff. The motion picture was not judged by the effect of an isolated portion. It was considered as a whole. No analogy may be drawn between "The Lovers" in the instant case and "Lady Chatterley's Lover," as considered in *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433.

The Appellant, at his trial, presented evidence as to the community standards of Cuyahoga County in order to support his claim that the motion picture was not obscene under the *Roth* test. Now, he complains that the trial court judged the movie by those standards. *Webster's New International Dictionary*, second edition, unabridged, defines the term *community* as:

"1. A body of people having common organization or interests, or living in the same place under the same laws and regulations. * * *

"2. Society at large; a commonwealth or state; a body politic; the public, or people in general;—used with the definite article; as the interests of the *community;* restrictedly, the people of a particular place or region, as a town, village, or neighborhood; hence, the region itself; as the proposed system will benefit our *community.* * * *" (Emphasis supplied.)

The court below did not fail to consider the so-called "artistic merit of the film." The court viewed the film itself. And it had before it the testimony of a film critic with forty-one years experience as a writer for the *Cleveland Plain Dealer;* a former television program chairman, currently an editorial writer and Cleveland radio broadcaster; and the editor of "Film in Review," published in New York, a monthly magazine devoted to every serious aspect of motion pictures, published by a national review board, which editor had reviewed 200 or 300 movies a year for the previous ten years. The Appellant's "experts," on the other hand, were unable to rebut the evidence that the movie was a piece of obscenity, not a work of art. The claim at page 41 of Appellant's Brief that "(t)he excellence of the direction, acting and photography had been generally acknowledged by those qualified to make such judgments" is without proof and is contrary to fact.

POINT IV.

Section 2905.34 of the Ohio Revised Code does not infringe the right of communication protected by the First and Fourteenth Amendments and is not void for vagueness under the Due Process Clause of the Fourteenth Amendment in making it a felony to knowingly possess or exhibit an obscene motion picture.

In Appellant's Point IV at page 41 of his brief he again misstates the issue by omitting the word "*knowingly.*"

This Honorable Court, aware of an outline of the evidence presented in the trial court and cognizant of the Ohio court's opinions, has an insight into the contents of the film in issue.

Patent offensiveness, as well as prurient interest appeal, characterizes "The Lovers." The reaffirmance of *Roth v. United States, supra*, in the recently decided case of *Manuel Enterprises v. Day, supra*, as well as the standards enunciated in *Manuel*, make it unnecessary for this Honorable Court to reconsider its previous rulings.

Nor does *Smith v. California, supra*, imply that a review would be in order.

CONCLUSION.

For the reasons set forth in this brief, it is requested that the order appealed be affirmed.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of
Cuyahoga County, Ohio.

Of Counsel:

JOHN T. CORRIGAN,
Prosecuting Attorney.

APPENDIX 1.

ORDER OF THE SUPREME COURT OF OHIO APPEALED FROM.

This cause, certified by the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; and it appearing that there were reasonable grounds for this appeal, it is Ordered that no penalty be assessed herein.

It is further Ordered that the Plaintiff-Appellee recover from the Defendant-Appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

APPENDIX 2.

MAJORITY OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, WITH OPINION PARTIALLY CONCURRING AND PARTIALLY DISSENTING.

Defendant was indicted on two counts by the September 1959 Grand Jury of Cuyahoga County, Ohio, for violation of Section 2905.34, Revised Code. The first count in the indictment reads as follows:

> "* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly had in his possession and under his control a certain obscene, lewd and lascivious motion picture film, to wit:
>
> "(Les Amants) 'The Lovers'
>
> "Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the

records thereof * * * and against the peace and dignity of the state of Ohio."

The second count in the indictment reads:

"* * * on or about the 13th day of November 1959, at the county aforesaid, unlawfully and knowingly exhibited a certain obscene, lewd and lascivious motion picture film, to wit:

"(Les Amants) 'The Lovers'

"Said motion picture film being so indecent and immoral in its nature that the same would be offensive to the court, and improper to be placed upon the records thereof * * * and against the peace and dignity of the state of Ohio."

Section 2905.34, Revised Code, so far as it pertains to the defendant and his conduct on November 13, 1959, reads as follows:

"No person shall *knowingly* * * * exhibit * * * or have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film * * *.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both." (Emphasis added.)

Upon arraignment the defendant entered pleas of not guilty to both counts of the indictment on November 30, 1959, and was released on bond.

On May 23, 1960, the defendant waived his right to trial by jury, both orally and in writing, and requested trial by a three-judge court. He was permitted to withdraw his pleas to make certain motions; thereafter the pleas of not guilty were re-entered and trial was had, resulting in a finding of guilty as charged in each count of the indictment.

The defendant was sentenced to pay a fine in the sum of $500 on the first count of the indictment and sentenced to pay a fine of $2,000 on the second count of the indictment and to stand committed to the workhouse of the city of Cleveland until such fine and costs were paid. Sentence was stayed pending appeal.

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is before this court pursuant to a certification of the record, the Court of Appeals finding its judgment to be in conflict with the judgment of the Court of Appeals of the Third Appellate District in the case of *State v. Wetzel*, decided December 10, 1960.

RADCLIFF, J. At the outset it is well to recall that an opinion of this court does not necessarily reflect the thinking and logic, if any, of any member of the court other than the author. It is the means by which the author of an opinion, in this case the writer, illustrates the path followed to reach a conclusion which, if concurred in by a majority of my distinguished colleagues (this term is used in all humility as my status as such is only temporary), is stated in the syllabus as the law of the case.

The defendant urges five assignments of error, the first two raising the constitutional issues involved. The third and fourth emphasize facts and the weight of the evidence, which we shall dispose of in the perfunctory manner, as the law requires of this court, in a short paragraph later in this opinion. The final assignment of error raises the question of general prejudice.

There is an oft-quoted cliche to the effect that "it is not possible to legislate in the field of morals." The statement originally was and still should be, "it is not possible to legislate morality for the people." In support of this,

there is always cited the classic example of the Eighteenth Amendment to the United States Constitution. We sorrowfully agree that this is true, but the impossibility of accomplishing that which is good for all the people should not and must not be used as an excuse for failing to try. History is replete with examples of nations that lost positions of eminence in the world and whose citizens lost their freedom due to decay of their moral fiber resulting in degeneracy and depravity. Legislative bodies must continue to pass laws which attempt to protect the morality of the people from themselves and from their own weaknesses. When such laws are rejected it should be by those governed, either by repudiating their legislators, by failing to re-elect or by direct referendum. It is infelicitous for the judicial branch of the government to seek for constitutional infirmities which enable courts to thwart the actions of that segment of government closest to the governed and directly responsive and responsible thereto. By its very nature, the judiciary is farthest from the people because of the length of tenure or mode of selection, consequently its authority must be exercised with deliberate caution. *Lex citius tolerare vult privatum damnum quam publicum malum.*

We turn now to a consideration of the provisions of Section 2905.34, Revised Code, in relation to the various pronouncements of the Supreme Court of the United States in interpreting such statutes. The pertinent part of Section 2905.34, Revised Code, with which we are presently concerned, reads as follows:

> "No person shall *knowingly* sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene * * * motion picture film * * *." (Emphasis added.)

At the outset it must be noted that the Supreme Court of the United States has held that obscenity is not protected by the constitutional provisions relating to freedom of speech. *Roth v. United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498, 77 S. Ct. 1304.

In *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct. 215, however, the Supreme Court struck down a state statute which imposed strict criminal liability for the mere possession for sale of an obscene book, without requiring any knowledge of the contents of the book. The case reserved, however, the question as to the extent of knowledge required which would validate such a statute.

Such infirmity does not exist in the statute under our consideration. It is specifically required under Section 2905.34, Revised Code, that the acts punished thereunder shall be done knowingly. The act requires knowledge. The question, of course, is knowledge of what. It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved.

Two questions must be determined at this time. First, the test as to what is obscene. The definition which has now become classic was laid down in *Roth v. United States, supra*, as follows, at page 489:

> "* * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Thus it is to be seen that the test for obscenity is not subjective but objective. It is not to be judged by what any single individual deems is obscene to himself, but rather what the community as a whole would consider obscene. There is no real or actual ambiguity in the phrase. No undue burden is placed on the possessor of such literature,

for even though the individual himself might not consider the subject matter obscene, it is indeed the isolated and uninformed person who would not know as a matter of fact what is obscene by the usual community standards, and as stated in *Roth v. United States, supra,* at pages 491 and 492:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '* * * [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' *United States v. Petrillo,* 332 U. S., 1, 7-8 [91 L. Ed., 1877, 67 S. Ct., 1538]. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

The second question which arises is as to what extent a person is bound to have knowledge of the contents of that which he possesses. To the dealer in what is commonly known as hard-core pornography there is little question. Such purveyors of obscenity can be presumed to know what they are dispensing. (*State v. Wetzel,* 173 Ohio St., 16.) It is in the more ethereal region of theoretical literary endeavor that the principal problem arises. Here, once again, the community must be the test. A commercial possessor obviously can not be held to the duty of examin-

ing and determining for himself the obscenity of all matters which pass through his hands, neither, however, can he profess ignorance of that which has become a matter of general knowledge in the community. The rule of reason must be applied in these matters. While the possessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under Section 2905.34, Revised Code.

Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section.

That there are marginal cases where such determination is difficult does not invalidate an otherwise valid enactment, *Roth v. United States, supra,* and *State v. Wetzel, supra.*

The final question that must be disposed of in relation to this section is the proper construction of the phrase, "in his possession or under his control," and its relationship to the rest of the section. Does such phrase relate to the mere private possession by an individual of such matter for his own personal gratification? If so, such section might well be held to be invalid. However, in our opinion, such is not the proper construction of this section, nor does it give effect to the apparent intention of the General Assembly.

It requires only a cursory examination of this section to determine that its language clearly relates to the circulation, publication and exhibition of obscene matter. In other words, to the dissemination of obscenity, whether for profit

or otherwise. Under the doctrine of *noscitur a sociis* the phrase, "in his possession or under his control," must be read in context with the language used in the section as a whole.

In the phrase, "knowingly possess," as used in criminal statutes, is implicit not only the element of scienter but also the element of mens rea, namely, "a guilty or wrongful purpose." It is not conceivable to us that a violation of Section 2905.34 is committed the moment an individual discovers that a book, picture or film in his possession is pornographic. He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and acts in furtherance thereof.

When this phrase is read in context with and in relation to the rest of the section, it is readily apparent that such phrase does not relate to the mere possession for private and personal gratification but rather to possession and control for the purpose of circulation or exhibition, a matter clearly within the power of the state to control under the police power.

The third and fourth assignments of error raise questions as to factual issues and the weight of the evidence. These issues have been resolved in the proper forums. The facts were found by the three judges sitting as the triers of the facts who applied the standards prescribed in *United States v. Roth, supra,* and by the Court of Appeals which the law requires must pass upon the weight and sufficiency of the evidence.

This Court viewed Les Amants (The Lovers). The film ran for 90 minutes. To me, it was 87 minutes of boredom induced by the vapid drivel appearing on the screen and three minutes of complete revulsion during the showing of an act of perverted obscenity. Les Amants (The

Lovers) was not hard-core pornography, *i.e.*, filth for filth's sake. It was worse. It was filth for money's sake. The producers, distributors and exhibitors evidenced so little responsibility in connection therewith that they have no right to assert constitutional guaranties which require a high degree of responsibility from those who seek their protection. This is especially apropos of the First and Fourteenth Amendments to the Constitution of the United States.

There is a unique coincidence involving this case (*State v. Jacobellis*) and the case of *State v. Warth*, 173 Ohio St., 15, as the obscene material involved in both was Les Amants (The Lovers). However, the statute involved in each case is entirely different. Jacobellis was indicted, tried and convicted for violation of Section 2905.34, Revised Code. Warth was indicted, tried and convicted for violation of Section 2905.342, Revised Code. The latter statute attempted to make *mere* possession or exhibiting an obscene motion picture film a misdemeanor. In view of the pronouncements of this Court in *City of Cincinnati v. Marshall*, 172 Ohio St., 280, 175 N. E. (2d), 178, and of the Supreme Court of the United States in *Smith v. California*, *supra*, and our high regard for the doctrine of *stare decisis*, the conviction of Warth was reversed due to the constitutional infirmity of Section 2905.342, Revised Code, in omitting the element of scienter or knowledge. The cases in reality had no common principle of law involved, and, consequently, the different conclusion reached in each can not provoke any possible question of inconsistency. Had Warth been charged in Montgomery County with a violation of Section 2905.34, Revised Code, he would have been as guilty as we now find Jacobellis in Cuyahoga County.

As we find no error in the judgment of the Court of Appeals, such judgment is hereby affirmed.

Judgment affirmed.

ZIMMERMAN, acting C.J., MATTHIAS, BELL and O'NEILL, JJ., concur.

HERBERT, J., dissents.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C.J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

TAFT, J., concurring in part. I cannot be as positive in condemning the film involved in the instant case as the majority opinion is. However, in my opinion, reasonable minds could determine beyond a reasonable doubt that this film is, to use the words of the statute, "obscene, lewd, or lascivious."

I agree, therefore, with the judgment so far as it relates to the second count of the indictment charging defendant with exhibiting that film.

I also agree with the majority opinion that the word "knowingly" in the statute relates not merely to possession and control of the film but also to what is in the film.

However, I cannot agree with the judgment of this Court, to the extent that it affirms the conviction of defendant on the first count charging defendant merely with knowingly possessing and having control of the film.

It is my opinion, as it was the opinion of Judges Bell, Peck, Herbert and myself in *State v. Mapp* (1960), 170 Ohio St., 427, 433, 166 N. E. (2d), 387, that the portion of the statute upon which the first count is based is constitutionally invalid. As stated in the opinion in that case:

> "If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime * * *. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded."

Likewise, under this statute, if anyone looks at a movie film that he has lawfully acquired to determine whether he should exhibit it and finds it to be obscene, he is forthwith and at that instant guilty of a serious crime. As a result, some who might otherwise look at movie films that are not obscene to determine whether they should exhibit those films may well be discouraged from doing so and free circulation and exhibition of movie films will be impeded.

If Section 2905.34, Revised Code, providing that "no person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious * * * motion picture film" were reasonably susceptible of interpretation as a prohibition of possession or control of such a film only where such possession or control was for the circulation or exhibition thereof, I could also concur in the judgment so far as it affirms the conviction on the first count. Apart from some consideration of the legislative history of this statute, this Court *might* be justified in proclaiming that there was a legislative intent that the "possession * * * or control," in order to be a crime, must be, to use the words of the majority opinion, "for the purpose of circulation or exhibition." But compare *State v. Warth*, 173 Ohio St., 15. As the majority opinion states, this matter is clearly within the power of the state to control under the police power.

It may be observed that it is probable that such a judicial proclamation of legislative intent would be helpful, if not conclusive, in avoiding a review by the United States Supreme Court of the constitutional validity of this portion of our statute.

However, the General Assembly has quite clearly indicated that it had no such intention. Thus, prior to

1939, the foregoing statute (then Section 13035, General Code) read so far as pertinent:

> "Whoever sells, lends, gives away [*i.e.*, circulates], exhibits * * * or has in his *possession for such purpose*, an obscene [etc.]." (Emphasis added.)

In that year, the General Assembly amended that statute by taking out the words "for such purpose" appearing after the word "possession," and added, after the latter word, the words "or has under his control." 118 Ohio Laws, 420.

The General Assembly thus quite clearly expressed a legislative intention not to modify the words "has in his possession or under his control" as the majority opinion and the decision in the instant case are modifying those words.

APPENDIX 3.

OPINION OF THREE-JUDGE DISTRICT APPELLATE COURT (175 N. E. 2d 123).

PER CURIAM:

This is an appeal on questions of law from a judgment arising from a decision rendered by the Court of Common Pleas of Cuyahoga County (Criminal Division) finding the defendant guilty as charged on two counts of an indictment as follows:

> "(1) Unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers), and:
>
> "(2) Unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: 'Les Amants' (or, The Lovers)."

The defendant elected to be tried before a court of three judges pursuant to Section 2945.07, Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, pursuant to the provisions of Section 2945.05, Revised Code. The trial was commenced on May 23, 1960 and concluded on June 3, 1960.

Section 2905.34, Revised Code, under which the defendant was convicted, insofar as pertinent, reads as follows:

> "No person shall knowingly sell, lend, give away, exhibit or offer to sell, lend, give away or *exhibit*, or publish, *or have in his possession or under his control*, an obscene, lewd or lascivious book, pamphlet, paper, magazine, writing, advertisement, circular, print, picture, photograph, *motion picture film* * * *."

The defendant-appellant complains of many assignments of error, one of which is that he was erroneously charged and found guilty of two separate crimes under Section 2905.34, Revised Code in that the first count

charged the defendant with knowingly having possession and control of a certain obscene, lewd and lascivious motion picture film, to-wit: "Les Amants," and the second count with unlawfully and knowingly exhibiting this same motion picture film. This assignment of error cannot be sustained.

This precise question was before the Montgomery County Court of Appeals, where defendant was found guilty by a jury on two charges, namely, (1) possessing and (2) exhibiting an obscene motion picture film "The Lovers," see opinion by Kerns, J., in *State vs. Warth,* (No. 2576) decided July 7, 1960. Appeal as of right to the Supreme Court dismissed *sua sponte* for reason no debatable constitutional question involved. *State vs. Warth,* 172 Ohio St. 246, decided May 3, 1961. While the conviction in the *Warth* case was for violation of Section 2905.342, Revised Code, nevertheless, the legal principles involved are identical as applied to the facts of the instant case.

Also, this same question was before this Court where one, Gevaras, was convicted in the Court of Common Pleas of this County on two counts of one indictment, 1, of knowingly possessing and the other of knowingly exhibiting the same "obscene, lewd, or obscene motion picture film" under the provisions of Section 2905.34, Revised Code. On appeal on questions of law, this Court affirmed the judgment of the Court of Common Pleas. Thereafter, the Supreme Court of Ohio dismissed the appeal as of right for the reason that "no debatable constitutional question" was involved. *State of Ohio, Appellee, v. Gevaras, Appellant,* 170 Ohio St. 404, 165 N. E. 2d 652 (February 3, 1960).

The remaining assignments of error are grounded principally upon the claim of the defendant that the provisions of the statute, namely, Section 2905.34, Revised

Code, are violative of the constitutional rights of the defendant and are, therefore, null and void.

The defendant contends that the moving picture film in this case is not obscene and that it is within the area of constitutionally protected freedom of speech or press.

This contention of the defendant cannot be sustained. As to the question of obscenity, the three judge trial court, after a lengthy trial, based upon the testimony of numerous witnesses, the viewing of the film and all the evidence, found the moving picture film in question to be obscene, lewd and lascivious within the definition, description and test set forth in *Roth v. United States*, 354 U. S. 476.

In negating the claim that obscenity is within the area of constitutionally protected freedom of speech or press, the Supreme Court of the United States in paragraph three of the syllabus of *Roth v. United States*, 354 U. S. 476, which was considered and decided June 24, 1957, together with the case of *David S. Alberts v. California*, on appeal from the Superior Court of California, Los Angeles County, held, inter alia, as follows:

> "Obscenity is not within the area of constitutionally protected freedom of speech or press—either (1) under the First Amendment, as to the Federal Government, or (2) under the Due Process Clause of the Fourteenth Amendment, as to the States."

And, in syllabus four (c) of the *Roth* case, *supra*, it is stated:

> "The standard for judging obscenity, adequate to withstand the charge of constitutional infirmity, is whether, to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest."

Further, the court held in paragraph six of the syllabus, at page 477:

"When applied according to the proper standard for judging obscenity, para. 311 of West's California Penal Code Ann., 1955, which, inter alia, makes it a misdemeanor to keep for sale or to advertise material that is 'obscene or indecent,' does not (1) violate the freedom of speech or press guaranteed by the Fourteenth Amendment against encroachment by the States, or (2) violate the constitutional requirements of due process by failing to provide reasonably ascertainable standards of guilt."

The court, as page 487 of the *Roth* case, declared:

"However, sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *"

The trial court, in finding the defendant guilty as charged, was governed by the standards defined and established in *Roth* and *Alberts* as appears in the clear and concise memorandum opinion filed by the trial court in the instant case, and without further discussion of the law, and in respect to the moving picture film, "Les Amants" we agree with and adopt the same as part of our opinion in this case, as follows:

"In the motion picture 'Les Amants' (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After

the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

"In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

"It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 U. S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. 'Les Amants' (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

"Therefore, the Court finds the defendant guilty as charged in both counts of the indictment."

As to each count of the indictment, the three judge court imposed a fine only.

Considering the record as a whole, including a viewing of the film by this Court, the film being an exhibit in the case, we conclude that the judgment of guilty by the three judge court is amply sustained by the evidence and that no error intervened prejudicial to the rights of the defendant.

The judgment must be and, therefore, is affirmed.

KOVACHY, P. J., SKEEL, J., HURD, J. concur.

APPENDIX 4.

MEMORANDUM OPINION OF THREE-JUDGE TRIAL COURT.

Before William J. McDermott, P. J., Roy F. McMahon, J., and John Pincura, J., (Pincura, J., Court of Common Pleas (Lorain County) sitting by designation in Cuyahoga County).

PER CURIAM

The defendant was indicted on two counts under the provisions of Section 2905.34 of the Revised Code in that he (1) unlawfully and knowingly had in his possession and under his control a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers), and (2) unlawfully and knowingly exhibited a certain obscene, lewd, and lascivious motion picture film, to-wit: *"Les Amants"* (or The Lovers).

At the request of the defendant the cause was tried before a court of three judges under Section 2945.07 of the Revised Code. Waiver of trial by jury was made in open court, in writing, signed by the defendant, filed in this cause and made a part of the record, all in accordance with the provisions of Section 2945.05 of the Revised Code.

In the motion picture *"Les Amants"* (or The Lovers) the dominant theme of sex is brought into sharp focus early in the film. After the stage has been set and the characters have assumed their relationships to each other, there is evident a calculated, concentrated, and determined effort to portray the sexual theme basely and wantonly. In a tantalizing and increasing tempo, the sexual appetite is whetted, and lascivious thoughts and lustful desires are intensely stimulated. The apex is reached when the wife of the publisher and the itinerant archeologist engage in protracted love play, give full vent to their emotions, and

indulge themselves in sexual activity. Very little, if anything, is left to the imagination. Lurid details are portrayed to the senses of sight and hearing. After the narrative has reached this carefully built up and long-anticipated climax, it scurries to a hasty conclusion.

In evaluating this motion picture the Court has been ever mindful of the film taken as a whole and its appeal to the average person and has applied contemporary community standards.

It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd, and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 US 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. *"Les Amants"* (or The Lovers), has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film.

Therefore, the Court finds the defendant guilty as charged in both counts of the indictment.

WILLIAM J. MCDERMOTT,
Presiding Judge.

ROY F. MCMAHON,
Associate Judge.

JOHN PINCURA,
Associate Judge.

APPENDIX 5.

STATUTE INVOLVED.

Ohio Revised Code Section 2905.34. *"Selling, exhibiting, and possessing obscene literature or drugs, for criminal purposes.*

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, paper magazines, or pictures.

"Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or

imprisoned not less than one nor more than seven years, or both."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, 1961 Supplement, at p. 8.)

APPENDIX 6.

RELATED STATUTE.

Ohio Revised Code Section 2905.37. "*Legitimate publications not obscene*:

"Sections 2905.33 to 2905.36 inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No article specified in sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Title 29, at pp. 63-64.)

APPENDIX 7.

RELATED STATUTE.

Ohio Revised Code Section 3767.01 (in effect at the time of Appellant's conviction). "*Definitions*:

"As used in all sections of the Revised Code relating to nuisances:

"(A) 'Place' includes any building, erection, or place of any separate part or portion thereof or the ground itself;

"(B) 'Person' includes any individual, corporation, association, partnership, trustee, lessee, agent, or assignee;

"(C) 'Nuisance' means that which is defined and declared by statutes to be such and also means any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This section and sections 2905.34, 2905.35, 2905.37 and 2933.21 of the Revised Code shall not affect any motion picture film which has been approved by the division of film censorship or any newspaper, magazine, or other publication entered as second class matter by the post-office department."

(Officially certified transcript printed in Page's Ohio Revised Code Annotated, Titles 37, 39, at p. 201.)

APPENDIX 8.

RULE XX OF THE RULES OF PRACTICE OF THE SUPREME COURT OF OHIO.

RULE XX.

Rehearings—Issuance of Mandates.

Section 1. No motion can be made or heard for a rehearing. Application for rehearing of any cause or motion shall be made within fourteen days after the announcement of the decision. Such application may be either printed or typewritten, and nine copies thereof filed with the Clerk, and shall be confined strictly to reasons for a rehearing. No reargument of the cause on such application will be considered.

Section 2. When typewritten applications are filed the same shall meet the requirements of Section 11(a) of Rule II.

Section 3. Repealed January 18, 1955.

Section 4. One week after the announcement of the decision of any cause on the General Docket the Clerk shall issue a Mandate as provided by the entry of this Court; and one week after announcement of decision of a motion to certify the record or for leave to file an appeal, if such motions be overruled, the Clerk shall issue a certified copy of the entry of this Court to the lower Court; provided, that if the Clerk be notified, within one week after announcement of a decision on the motion or general docket that application for a rehearing will be filed, such Mandate or certified copy of entry shall be held until such application be disposed of by the Court or the time for filing the same has expired and shall be then forthwith issued. If an application be granted the former entry of this Court shall be thereby vacated and no Mandate or certified copy of entry shall issue until such rehearing has been had and the case or motion has again been decided.

APPENDIX 9.

EXCERPT FROM APPELLANT'S BRIEF IN THE SUPREME COURT OF OHIO.

* * * * *

In 1957, the Supreme Court of the United States attempted to redefine "obscenity" in *Roth v. United States*, 354 U. S. 476. In this most recent definition of "obscenity," the court stated the test to be:

> "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests." *Id.* at 489.

This definition in the *Roth* case has already been rejected by the Supreme Court of Pennsylvania in *Commonwealth v. Blumenstein*, 396 Pa. 417 (1959). See also *William Goldman Theatres, Inc. v. Dana*, No. 530 Commonwealth Docket, 1959 No. 2385, C. P. Pa., July 30, 1960, and *Twentieth Century-Fox Film Corporation v. Boehm*, No. 538 Commonwealth Docket, 1959, No. 2387, C. P. Pa., July 30, 1960, in which the court followed the holding in the *Blumenstein* case, in finding that the term "obscene" was unconstitutionally vague.

The definiteness and workability of the definition in the *Roth* case is well worth the consideration of this Court:

(a) *Prurient interest*—The term "prurient interest," as contained in the *Roth* case definition, added nothing new to the already existing definition of obscenity. *Webster's International Dictionary* (2d ed. 1959) defines prurient to include the more familiar terms of "lascivious" and "lewd." Thus, prurient interest provides no more objective definition than does the word "obscene" itself. For example, the charge of the trial court in the *Roth* case was, as follows:

"It must tend to stir sexual impulses and lead to sexually impure thoughts." (Record, p. 25, *United States v. Roth*, 237 F. 2d 796 (2d Cir. 1956).)

Apparently the United States Supreme Court, in affirming, approved a charge which defines "obscene" in terms of itself. *Webster's International Dictionary* (2d ed. 1959), states one of the definitions of the word "impure" to be "obscene." It is abundantly clear that although some may argue that "everybody knows what obscene means," no one can define it except in terms of itself. Appellant contends that the attempt of the prosecuting attorney to base a criminal conviction on terms as vague as those embodied in Section 2905.34, is not compatible with due process of law.

(b) *Dominant theme*—It is not every publication which "appeals to prurient interests" that is obscene. Rather, it is only those publications the dominant theme of which has this appeal. See *Grove Press, Inc. v. Christenberry*, 175 F. Supp. 488 (S. D. N. Y. 1959). The subjective definition of "obscene" coupled with the determination of what is the "dominant theme" of a publication, a judgment which is also necessarily subjective, has played havoc with the orderly administration of justice. In fact, the determinations by lower courts in this area have become nothing more than a guessing game. For instance, see *Sunshine Book Co. v. Summerfield*, 355 U. S. 372 (1958), *reversing* 249 F. 2d 114 (D. C. Cir. 1957); *One, Inc. v. Oleson*, 355 U. S. 371 (1958), *reversing* 241 F. 2d 772 (9th Cir. 1957); *Times Film Corp. v. Chicago*, 355 U. S. 35 (1957), *reversing* 244 F. 2d 432 (7th Cir. 1957). In each of these cases the lower court had made its carefully considered determination that the material there involved was in fact obscene. However, the United States Supreme Court reversed each of these decisions in a per curiam

opinion, citing the *Roth* case. This record of lower court reversals is certainly not evidence that the definitions in the *Roth* case provides to this appellant or to the courts, or for that matter, to any individual an ascertainable standard of conduct.

(c) *Contemporary community standards*—As yet, it appears that no court has determined what community's standards were to apply under the definition in the *Roth* case. Is it a nationwide standard, a statewide standard, or a local standard? And if it is the latter, is it the community in which the literature is published, the community in which it is read, or the community in which the literature is sold? Certainly, there is no national standard with respect to obscene literature in the United States. We are a country composed of fifty states with widely varying mores. This is abundantly clear as will be revealed by an examination of the various statutes of the states dealing with liquor, gambling, fornication and adultery. Once more, it is impossible to contend that the State of Ohio is a community in the sense that it has one moral standard. Literature which might be considered shocking in Ohio's rural areas may well be considered commonplace in Ohio's large industrial centers. There is grave doubt that even the residents of Cuyahoga County, or, in fact, the residents of the City of Cleveland, share a common standard. How is the standard of any community to be determined? Is it that which is distasteful to the average member of the community? Can such a determination be made by plebiscite? Can the First and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Constitution of Ohio be interpreted to allow the literary tastes of the average to govern that which the minority may read? Appellant submits that they cannot. In fact,

the "contemporary standard of the community" is no standard at all.

Although it may be argued that the test in the *Roth* case is determinative, at least for the moment, of the constitutionality of a statute proscribing the dissemination of "obscene" material insofar as the United States Constitution is concerned, the *Roth* decision is not binding in any manner as to the application to such a statute of Article I, Section 16 of the Constitution of the State of Ohio. The First Amendment to the Federal Constitution provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

Article I, Section 11 of the Constitution of Ohio contains the following:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press * * *."

It thus appears that the guarantee of freedom of speech contained in the Ohio Constitution is even stronger than its counterpart in the Federal Constitution as contained in the First Amendment. It was on the basis of a similar comparison that the Courts of the Commonwealth of Pennsylvania have rejected the test set forth in the *Roth* case for the reason that it is too vague. *Commonwealth v. Blumenstein, supra; William Goldman Theatres, Inc. v. Dana, supra; Twentieth Century-Fox Film Corp. v. Boehm, supra.*

Further, the Court of Appeals of New York in *People v. Richmond County News, Inc.*, 9 N. Y. 2d 573 (1961), a decision rendered on May 25, 1961, held that it was not bound by the test in the *Roth* case as applied to its Penal Law. Rather, because of the vagueness of the *Roth* defini-

tion, that court held that the New York Penal Law should be applied only to "hard-core pornography."

Appellant requests this Court to reject, as did the Supreme Court of the Commonwealth of Pennsylvania and the Court of Appeals of New York, the test announced in *Roth v. United States*, for the reason that it is unconstitutionally vague, and for the further reason that it is impractical and unworkable.

* * * * *

APPENDIX 10.

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, STATE OF OHIO vs. WARTH (173 Ohio St. 15, 179 N. E. 2d 772).

(No. 36964—Decided January 17, 1962.)

APPEAL from the Court of Appeals for Montgomery County.

The defendant, as manager of a theatre in the city of Dayton, gave a public showing of a film titled "The Lovers." Because of such showing of the film, an affidavit was filed in the Dayton Municipal Court charging that defendant did "unlawfully exhibit, or have in his possession, or under his immediate control an obscene motion picture film contrary to Section 2905.342 of the Ohio Revised Code and against the peace and dignity of the state of Ohio."

Section 2905.342, Revised Code, reads in part:

"No person shall produce, sell, lease, lend, give away, or distribute for the purpose of exhibition, or exhibit, or have in his possession or under his immediate control for any purpose:

"(A) An obscene motion picture film; or

"* * *

"Whoever violates this section shall be fined not more than five thousand dollars, or imprisoned not more than six months, or both."

Defendant entered a plea of not guilty and was tried to a jury in the Dayton Municipal Court, found guilty as charged in the affidavit, sentenced to imprisonment in the workhouse of the city of Dayton and ordered to pay a fine and costs of the prosecution.

The Court of Appeals, on appeal from the Municipal Court, affirmed the judgment.

The allowance of a motion to certify the record brings the cause to this Court for review.

Mr. Arthur O. Fisher, city prosecutor, *Mr. Henry W. Phillips* and *Mr. Edward J. Duffy, Jr.*, for appellee.

Messrs. Wright, Harlor, Morris, Arnold & Glander, for appellant.

Per Curiam. Section 2905.342, Revised Code, making it a misdemeanor to have in one's possession an obscene motion picture film, without reference to knowledge or scienter on the part of an accused, is unconstitutional. *City of Cincinnati v. Marshall*, 172 Ohio St., 280; *Smith v. California*, 361 U. S., 147.

The judgment of the Court of Appeals is reversed.

Judgment reversed.

ZIMMERMAN, acting C. J., RADCLIFF, TAFT, MATTHIAS, BELL and HERBERT, JJ., concur.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C.J.

RADCLIFF, J., of the Fourth Appellate District, sitting by designation in the place and stead of ZIMMERMAN, J.

APPENDIX 11.

OPINION OF THE SUPREME COURT OF THE STATE OF OHIO, STATE OF OHIO vs. WETZEL (173 Ohio St. 16, 179 N. E. 2d 773).

(No. 36945—Decided January 17, 1962.)

CERTIFIED by the Court of Appeals for Wyandot County.

Edward J. Wetzel, the appellee herein, was indicted by the Grand Jury of Wyandot County in the following language:

> "The jurors of the Grand Jury * * * do find and present that Edward J. Wetzel * * * on the 8th day of February * * * 1960, at the county of Wyandot aforesaid, did unlawfully and knowingly have in his possession and under his control, obscene, lewd and lascivious picture photographs, pamphlets and other articles all of an indecent and immoral nature and all of which are too obscene for further description within the limits of decency and contrary to Section 2905.34 of the Revised Code of Ohio, and against the peace and dignity of the state of Ohio."

He pleaded not guilty and was tried before the Court of Common Pleas. A verdict of guilty was returned by the jury, and the defendant was sentenced to imprisonment in the Ohio Penitentiary.

An appeal on questions of law to the Court of Appeals resulted in a reversal of the judgment below and an order directing the discharge of the defendant. Such reversal was based on the determination that the part of Section 2905.34, Revised Code, under which the defendant was indicted and tried, is unconstitutional and void, being in violation of "Article I, Section 11 of the Constitution of Ohio and the provisions of the First Amendment to the Constitution of the United States."

The judges of the Court of Appeals, finding the judgment rendered to be in conflict with the judgment of the Court of Appeals for Cuyahoga County in the case of *State v. Mapp* (March 31, 1959), certified the record to this Court for review and determination.

Mr. Forrest H. Bacon, prosecuting attorney for appellant.

Mr. Francis M. Marley, for appellee.

ZIMMERMAN, acting C. J. Section 2905.34, Revised Code, in its pertinent parts reads as follows:

> "No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print [or] picture * * *.
>
> "Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not less than one nor more than seven years, or both."

On the trial, evidence presented by the state showed that on February 8, 1960, pursuant to a telephone call, the sheriff of Wyandot County went to a farm owned by the defendant's mother-in-law and located on a county road in Wyandot County some two and one-half to three miles west of the city of Carey. There, in a small barn on the premises, the sheriff found a chained and padlocked automobile trailer belonging to the defendant and admittedly placed there by him. The sheriff cut the chains, opened the trailer and discovered over 19,000 packaged duplicate items wrapped in brown paper sacks and consisting of illustrated pamphlets, photographs and reproductions of photographs and pen-and-ink drawings accompanied by reading matter, most of which material was of the lewdest and most lascivious character—an assorted collection of filth, shocking and repugnant to the average normal in-

dividual of any locality; in short, pornography at its very worst.

On the following day, the defendant was apprehended and charged with the crime defined in Section 2905.34, Revised Code. There were found in his possession keys which fitted the padlocks fastening the chains on the trailer.

Witnesses who lived nearby testified that to their knowledge defendant visited the part of the barn in which the trailer was housed some seven or ten times between November of 1958, when the trailer was placed in the barn, and February of 1960 and remained for periods of from ten to fifteen minutes to an hour. On one occasion, one of the witnesses observed the defendant carrying from the barn a brown colored package resembling and about the size of a shoe box. The defendant told the witness that, upon request, he occasionally sold material contained in the trailer.

In his own defense, defendant testified that he had not placed the chains and padlocks on the trailer and was unaware of the trailer's contents. He said that he had leased the trailer to another, with the privilege of purchase, and that he, defendant, visited it solely to see whether it was intact and unmolested. Defendant testified further that he secured the keys to the padlocks from the one to whom he had leased the trailer, and that such person was then serving a term in the Ohio Penitentiary.

The only other witness appearing for the defendant was a medical doctor who was treating the defendant professionally. He testified as to defendant's poor physical condition due to a heart ailment, hardening of the arteries and other disorders of internal organs. He said further that the defendant was incapable of strenuous physical activity.

It is a well established principle of law that a statute, under one application, may operate unconstitutionally, but, under another and different application, its operation may be perfectly valid. Such was the pronouncement of the Supreme Court of the United States in the cases of *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S., 282, 66 L. Ed., 239, 42 S. Ct., 106, second headnote; and *Alabama, State Federation of Labor v. McAdory*, 325 U. S., 450, 462, 89 L. Ed., 1725, 1735, 65 S. Ct., 1384, 1390. Or, as was held by this Court in the first paragraph of the syllabus of *State, ex rel. Herbert v. Ferguson, Aud.*, 142 Ohio St., 496, 52 N. E. (2d), 980, "where, under one state of facts, the operation of a statute is constitutional, a court will not declare it invalid because under another state of facts, not involved, its operation would be unconstitutional."

To the same effect, see *State, ex rel. Speeth et al., Board of County Commrs., v. Carney, Aud.*, 163 Ohio St., 159, 126 N. E. (2d), 449.

Here, under the state's evidence, the deduction is warranted that this large quantity of pornographic material was possessed by defendant with knowledge of its nature, and that it was held for sale and distribution. The situation differs from one where an individual merely possesses material of that kind for his own private purposes.

Therefore, we think the quoted portions of the statute are constitutional and valid as applied to the defendant under the evidence outlined above.

The instant case is unlike that of *Smith v. California*, 361 U. S., 147, 4 L. Ed. (2d), 205, 80 S. Ct., 215. That case involved an ordinance of the city of Los Angeles making it unlawful for any person to have in his possession any obscene or indecent book in any place where books are

sold or kept for sale. The court construed the ordinance as fixing strict or absolute criminal liability, without requiring any element of scienter, *i.e.*, knowledge by the defendant bookseller of the contents of the book for the possession of which he was convicted. The majority of the court held that that ordinance, although directed to obscene matter, violated the constitutionally protected rights of freedom of speech and of the press, because it lacked the element of scienter on the part of the bookseller.

Surely the state in the exercise of its sovereign power may enact and enforce legislation designed to protect its people, particularly the young, inexperienced and unsophisticated, from the corrupting and degrading influence of what is plain unmitigated filth.

We are not confronted here with an illegal search and seizure in violation of defendant's constitutional rights. No objection was made by defendant in the trial court to the introduction of the pornographic material taken from the trailer on that ground, and that there may have been an illegal search and seizure was mentioned only casually in the Court of Appeals. *State v. Mapp* (U. S.), 6 L. Ed. (2d), 1081, 81 S. Ct. 1684.

The judgment of the Court of Appeals is reversed and that of the Court of Common Pleas affirmed.

Judgment reversed.

RADCLIFF, MATTHIAS, BELL and O'NEILL, JJ., concur.

TAFT, J., dissents for the reason stated in the majority opinion in *State v. Mapp* (1960), 170 Ohio St., 427, 433 166 N. E. (2d), 387, and in the concurring opinion in *State v. Jacobellis*, 173 Ohio St., 22 at page 29.

HERBERT, J., dissents for the reason stated in the opinion in the case of *State v. Mapp*, 170 Ohio St., 427, 166 N. E. (2d), 387.

ZIMMERMAN, J., sitting in the place and stead of WEYGANDT, C. J.

RADCLIFF, J., of the Fourth Appellate District sitting by designation in the place and stead of ZIMMERMAN, J.

BELL, J., concurring. The authorities cited in the majority opinion herein clearly support the proposition stated in the first paragraph of the syllabus to the effect that, under one application, a statute may operate unconstitutionally yet, under another and different application, may operate validly.

Possession of nearly 20,000 copies of pamphlets, photographs and drawings which, to give them their most charitable description, can only be designated as hard-core pornography could be for one purpose and one purpose only—dissemination for profit. The intent of the Legislature in enacting Section 2905.34, Revised Code, must have been to prevent such dissemination or some other equally pernicious guilty purpose; it can not be assumed that the Legislature intended a deliberate invasion of personal freedoms.

Such an intent is a far cry from intending to make guilty under this statute a person who has in his personal library an isolated example of what might by many, or even by a few, be termed obscene. It is a far cry from intending to make guilty a clerk of courts who accepts for filing an exhibit or a judge or juror who later examines such exhibit, knowing or believing it to be obscene. All would be equally guilty if we assume that the Legislature intended that no guilty purpose need accompany the knowingly possessing.

In drawing a line between concepts as basic as personal freedom and the police power, a fine-pointed pen is often required. But fine or broad, the line must be

drawn with reason. If, by judicial interpretation, that line can, with reason, be drawn so as to accomplish the purpose sought by the exercise of the police power and at the same time protect the freedom of the individual, it should be so drawn.

The interpretation given this statute herein, and in the majority opinion in *State v. Jacobellis*, 173 Ohio St., 22, is, in my opinion, the only reasonable interpretation that can be given it. If, by implying the elements of guilty knowledge and guilty purpose, the salutary effect that it may be hoped the statute will have on our society can be given impetus, then that implication should be made. To interpret it, on the other hand, in such a way as to make mere knowingly possessing unlawful without either guilty knowledge or purpose accompanying that possession would, of necessity, make its application unconstitutional as the majority of this court felt was the result of such application in *State v. Mapp*, 170 Ohio St., 427.

APPENDIX 12.

OPINION OF THE U. S. DISTRICT COURT, N. D. ILLINOIS, E. D., ZENITH INTERNATIONAL FILM CORPORATION vs. CITY OF CHICAGO (183 F. Supp. 623).

CAMPBELL, *Chief Judge*.

* * *

From the opening scene in this motion picture, the appeal to the prurient interest is presented in a tantalizing increasing tempo which intensifies the sexual desire to its apex when the wife and archeologist engage in the anticipated act of sexual intercourse in her bedroom.

The actual bedroom scenes begin, after a series of moonlight scenes which serve to whet the sexual appetite, with the inpassioned lovers frenziedly undressing one another in such a manner as to suggest complete nakedness.

Upon entering the bed and as the acts begin, the film registers every possible emotion of sexual feeling and pleasure on the wife's face and then shifts to her writhing, contorted arm, hand and body as sexual climax approaches and occurs.

Those scenes immediately following suggest sexual gratification as the lovers lie in bed in apparent naked contentment and then, later, as they playfully disport in the same tub.

I find that the motion picture, viewed as a whole, is completely centered around and dominated by sexual play and gratification.

(9) For these reasons, I find that the motion picture, "The Lovers," appeals to the prurient interest, is obscene, and therefore censorable under the Chicago ordinance.

* * *

APPENDIX 13.

CLEVELAND PLAIN DEALER, Thursday, November 12, 1959
CLEVELAND NEWS, Wednesday, November 11, 1959

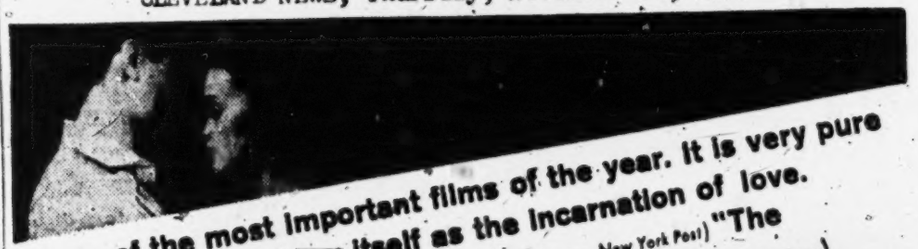
When all conventions explode ... in the most daring love story ever filmed!

The LOVERS

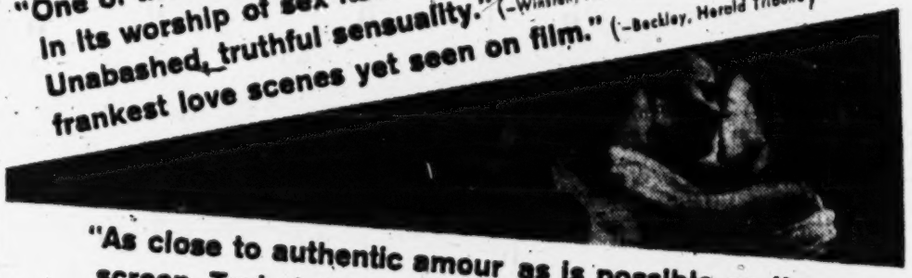
starring Jeanne MOREAU - Jean-Marc BORY

HEIGHTS ART THEATRE

CLEVELAND NEWS, Thursday, November 12, 1959



"One of the most important films of the year. It is very pure in its worship of sex itself as the incarnation of love. Unabashed, truthful sensuality." (-Winsten, New York Post) "The frankest love scenes yet seen on film." (-Beckley, Herald Tribune)



"As close to authentic amour as is possible on the screen. Truly tender and compassionate examination of a sudden torrid love affair. Jeanne Moreau is superb." (-Weiler, New York Times) "Most revealing story of illicit love that has yet come out of France." (-Hale, Daily News)

the Lovers

starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

Starts TONIGHT!

HEIGHTS Art Theatre 2781 EUCLID HTS BLVD YE 2-5955

Show Time: 7:15, 9:05

THE CLEVELAND PRESS, Thursday, Nov. 12, 1959

NEW YORK LOVES "THE LOVERS"

"As close to authentic amour as is possible on the screen—Truly tender and compassionate examination of a sudden torrid love affair...Jeanne Moreau, is superb."
— Weiler, New York Times

"Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair. Something of a sexual revelution appears to be going on in the cinema and Malle may well be one of the prophets."—Alpert, Saturday Review

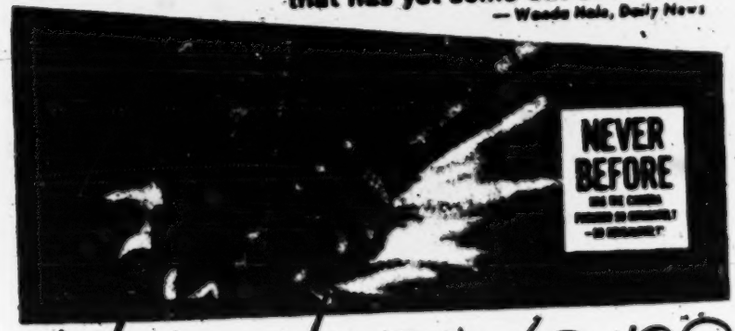
"This beautiful, rare film is the outstanding one to see."
—Gessel, The New Yorker

"Contains one of the longest and most sensuous love scenes to be seen in this country."—Newsweek

"One of the important films of the year. It is very pure in its worship of sex itself as the incarnation of love."—Winsten, N.Y. Post

"The frankest love scenes yet seen on film."
— Beckley, Herald Tribune

"The most revealing story of illicit love that has yet come out of France."
— Wanda Hale, Daily News



the Lovers

starring Jeanne MOREAU · Jean-Marc BORY · Directed by Louis MALLE

CLEVELAND NEWS, Friday, November 13, 1959

NEW YORK LOVES "THE LOVERS"

"As close to authentic amour as is possible on the screen—Truly tender and compassionate examination of a sudden torrid love affair...Jeanne Moreau, is superb."
—Weiler, New York Times

"Malle has done something rather rare. He has dealt both boldly and poetically with the story of a love affair. Something of a sexual revolution appears to be going on in the cinema and Malle may well be one of the prophets."—Abert, Saturday Review

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"The frankest love scenes yet seen on film."
—Beckley, Herald Tribune

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—Wanda Hale, Daily News

. . . and THE CLEVELAND NEWS ALSO LOVES "THE LOVERS." says Arthur Spaeth: "Artful cinema. I salute the sensitivity and excellently cinematic virtues of an adult observation of love. . . Uncommon picturization . . . a remarkable acting company."

the Lovers

starring Jeanne MOREAU - Jean-Marc BORY - Directed by Louis MALLE

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NEW YORK LOVES "THE LOVERS"

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the Lovers

starring Jeanne MOREAU - Jean-Marc BORY - Directed by Louis MALLE

Now Showing! HEIGHTS TONITE AT 6:45, 8:15, 10:05

ADVENTURE IN FILTH

Full Condemnation for 'The Lovers'

By W. WARD MARSH

"The Lovers"
Heights-Art

• • •

"THE LOVERS" ("Les Amants") drama in CinemaScope from France with English titles, directed by Louis Malle who also wrote the screen play. From the novel "Pointe de Lende-main" by Dominique-Vivant. A Zenith International presentation, played by the following cast:

Jeanne.....Jeanne Moreau
Henri.....Alain Cuny
Raoul.....Jose-Luis de Villalonga
Bernard.....Jean-Marc Bory
Maggy.....Judith Magre
Servant.....Gaston Modot

When I began this business of looking seriously at motion pictures, I honestly never dreamed that I would have to review a "stag" movie.

This, then, is my first review of such picture and the first of its kind I have ever seen. I lay no claim to purity. At the same time, I want no part of filth . . . least of all on the motion picture screen.

Without its shockingly nasty climax, "The Lovers" would be shunned by all moviegoers. With it, the prurient-minded will have a ball.

I have read out-of-town reviews by the so-called cognoscenti and the intelligentsia who have declared "The Lovers" to be screen poetry. The verdict here: a dull picture until it turns to screened pornography, and then it becomes nauseous.

The Story

Suppose for the moment I condone its pornographic sequences — which I do not! — there are other entirely destructive moral issues which are almost as unacceptable, or will be unacceptable to people who consider themselves as decent folk.

This other phase can be most easily exposed by relating quite briefly the story of "The Lovers."

A married woman, living in a major city, regularly visits Paris. I base my estimate of the size of her city by the fairly large newspaper plant which her husband owns and operates.

He apparently doesn't care much for her. So she goes to Paris to see a long-time friend and to have a mild flirtation with a polo player. It is mild compared with what happens later in the film.

When her husband insists that she invite these friends down to their rural chateau, she does this but is late arriving home because her car breaks down. She is given a lift by a sour-faced archaeologist. Husband insists that the new guest remain for the night.

This guest is left downstairs to play records, have a nightcap, etc., but he strolls over the estate in the moonlight and is soon joined by the wife in chamber attire.

Before a cloud can obscure the moon they are in each other's arms. This continues as they stroll, as they take a boat ride and as they return to the house where the guest is ushered into her room while she tucks her small daughter in for the night and tells the sleeping child that she is her love.

Now, aside from the chamber scene which is at once disgusting and revolting, adultery is more than pardoned when the pair of lovers ride off into whatever their future holds for them, or, possibly, as long as the gasoline holds out.

The early chapters are dull beyond belief. The husband's attitude toward his wife is so contrived that adultery can be anticipated long before it happens.

Perhaps the "surprise," and the quotes are needed, comes because one has expected the virile polo player to be the chamber guest when, actually it turns out to be the archaeologist whose manliness is distinctly open to question.

None of the players is worth a line of type.

By exhibiting "The Lovers" the Heights-Art has done incalculable harm to all other theaters showing decent motion pictures.

"The Lovers" lights every censorship torch. It will be a very great calamity when or if all other good, clean, honest, decent motion picture theaters have to atone for the curse which one theater can put upon them all.

CURLY-HAIRED VICTOR MATURE is bewitched and then virtually scalped by Hedy Lamarr as the Biblical siren of the late Cecil B. DeMille's successful movie being revived by Loew's State Theater today. It's "Samson and Delilah," in which Mature portrays the mighty warrior who fights the Philistines single-handed.

AMUSEMENTS

Public Hall—Sun., Nov. 15, 5 p.m.
115 Member
VIENNA PHILHARMONIC ORCHESTRA
Herbert Von Karajan, Conductor
Program

Symphony No. 5 in C Minor, Opus 67—Ludwig von Beethoven
Till Eulenspiegel's Merry Pranks, Opus 29—Richard Strauss
Suite from "The Water Music"—Georg Friedrich Handel
Tickets: $6.00, 5.00, 4.00, 3.00, 2.00

MUSIC HALL ONE NIGHT ONLY WED., NOV. 18 AT 8:30
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the personality she has evolved to replace the little girl she once projected is tainted with just the right amount of sophistication. Miss Caron's acting effects are more consciously and artfully achieved than many hitherto have perceived.

Cesare Danova plays the soldier-of-fortune. He acts well, especially in the renunciation scene, but he is so unprepossessing! European women, however, seem to like him.

I'm not quite sure what Johnson intended by the gangster and the baron whom the gangster takes under his wing. That Hollywood has shots have used gangsters in [redacted] hensible capacities has been [redacted] before (most recently [redacted] Knife). But Willie [redacted] the type. As for [redacted] son depicts [redacted] catatonic alcoh[redacted] when the Baron [redacted] lovers should never [redacted] kills the gangster who [redacted] kill the soldier-of-fortune, [redacted] raises symbolical intimations of sociological ideas and issues he never develops.

Nor does he make Willie's character clear. I'm willing to go along with those who say Willie's failure to consummate the marriage was a recoiling self-immersion in work after too many Hollywood dames. Others, I realize, leapt to a different suspicion.

It would be interesting to know just what Johnson intended originally, what occasioned his various changes of mind; what his opinion is of the picture as it is now. H. H.

THE 400 BLOWS

Written, directed and produced for $65,000 in France by young Louis Truffaut, this little film re-asserts the truism that some juvenile delinquency results from the ignorance, stupidity and selfishness of grown-ups.

The 12-year old boy who here suffers psychic blow upon blow, was born illegitimately to an instinctual ignoramus who [redacted] when faithless to another lover [redacted] the decency to marry [redacted] school teacher is [redacted] who misinterprets [redacted] impulses in the [redacted]

[redacted] able art is required to animate such cliché script situations and [redacted] acter motivations. No such art is visible here. The all-important boy-actor (Jean-Pierre Leand) is not too appealing, and the rest of the players are indifferent actors. Henri Decae's black-and-white photography is adequate, but Truffaut's direction is amateur.

However, Truffaut is still very young. And to his credit is the fact that instead of exploiting sex, sensationalism and despair in his first feature film, he elected to deal with subject matter that has human as well as social importance.

LOUISE CORRIS

THE LOVERS

It is pictures such as this that make the commercialism of Hollywood seem relatively wholesome.

The script of *The Lovers* is an unbelievable contrivance to lead up to one scene in which the camera records

at length the facial reactions of a woman during cunnilingus.

Brahms, polo, a beautiful estate outside Dijon, and other socially acceptable *divertissements*, are used to lift *The Lovers* out of the class of "smoker" pornography and into the class of pornography for "cultivated" degenerates.

Louis Malle wrote and directed, and Jeanne Moreau played the wife who, while her husband, Paris lover and child are in the house, gives herself to another man.

They should be ashamed, as should everybody else connected with such low-grade, anti-social money-grubbing.

A SUMMER PLACE

Written, dire[redacted] produced by Delmer Dave[redacted] *Place*, like *Blue Denim*[redacted] teenage sexual inter[redacted] the inadequacies of p[redacted] ward as, justification giving in to sexual desire. we are left to believe the te[redacted] with a baby on the way, will married and make a living running a summer hotel on an island off the New England coast.

There are other strands in the above story. Arthur Kennedy plays a drunken descendant of a once honorable New England family; Dorothy Maguire is the wife who had never loved him and had had an affair with Richard Egan before *her* marriage (an affair she resumes after 20 years). It is her son by Kennedy who impregnates the daughter Egan had by the wife he married on the rebound from Maguire. Egan's wife, in a badly written role, is overplayed by Constance Ford. The teenagers are played by Sandra Dee and Troy Donahue.

All the above is supposed to take place along the Atlantic coast. It was beautifully photographed in color by Harry Stradling at Carmel, Pacific Grove and Pebble Beach in California.

I can only hope *A Summer Place* will seem as unrealistic to teenagers as it did to me. ELLEN FITZPATRICK

THE SINS OF LOLA MONTES

Max Ophuls' last film, *Lola Montes*, much touted in Europe several years ago, is not being shown here in its original form. Some 40 minutes have been hacked away, following considerable re-editing. The incoherent result, needless to say, is quite different from Ophuls' original conception, which was said to have been modelled upon the unorthodox story-telling de[redacted] of *Citizen Kane*.

[redacted] great pity we are forced to [redacted]ure in such a mutilated [redacted]uch of what remains [redacted] and the English du[redacted] good. The Eastma[redacted] is beauti ful, as ar[redacted] decor. Indeed, some o[redacted]light, ing and virtuos[redacted]rk are breath-taking.

It is impossible to tell whether or not in the original the visuals were matched by effective drama. Certainly there is cinematic style, and more than a hint of adroit acting, especially by Anton Walbrook as King Ludwig of

APPENDIX 20.

BILL OF PARTICULARS, COURT OF COMMON PLEAS.

Responding to the request of the defendant for a bill of particulars, the prosecuting attorney says that, on the trial of the above-entitled cause, the plaintiff will prove:

(a) That the defendant had the said motion picture film in his possession and under his control in his position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations of Heights Art Theatre, a movie house in the City of Cleveland Heights, in which movie house the said motion picture film was located and at which the said motion picture film was exhibited.

(b) That the defendant, in his position, capacity, and authority as manager, proprietor, local responsible head, and having charge of the operations of the said Heights Art Theatre, exhibited the said motion picture film through the medium and services of a motion picture projectionist who operated a machine commonly known as a movie projector; which projector cast images from the said motion picture film onto a surface commonly known as a movie screen in view of the theater patrons; and which projector caused words, spoken dialogue, music, and other sounds to be transmitted from a sound track on the said motion picture film through an amplifier and made audible to the theater patrons.

JOHN T. CORRIGAN,

County Prosecutor,

By (Signed) THOMAS L. OSBORNE,

(Signed) BERNARD J. STUPLINSKI,

Assistant County Prosecutors.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] //

NICO JACOBELLIS,
Defendant-Appellant,

against

STATE OF OHIO,
Plaintiff-Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF

EPHRAIM LONDON,
Attorney for Appellant,
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New York 17, N. Y.

On the Brief,
EPHRAIM LONDON
BENNET KLEINMAN
MARTIN GARBUS

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The question (discussed in Point II of appellant's brief) of whether §2905.34 on its face abridges the freedom of the press, is presented in the jurisdictional statement and is properly before the Court 7

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 164

NICO JACOBELLIS,

Defendant-Appellant,

against

STATE OF OHIO,

Plaintiff-Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

REPLY BRIEF

The Court is requested to disregard the matter set out in Appendices 12, 14, 15, 16, 17, 18 and 19 to the Appellee's brief.

Appendix 12 to the Appellee's brief contains a part of the opinion of the Court in *Zenith International Film Corp.* v. *City of Chicago* (1960), 183 F. Supp. 623 (D. C. Ill.), The case is also cited in the Appellee's brief (at p. 4). It is cited by the Appellee as authority supporting its contention that "The Lovers", the film involved in this case, is obscene. There is no reference, in the Appellee's brief, to the fact that the case was reversed on appeal in *Zenith International Film Corp.* v. *City of Chicago* (1961) 291 F.

2d 785 (7th Cir.). The ground for reversal was that the Chicago Film Board had not accorded the owner of the film a full and fair hearing in judging "The Lovers" obscene. 291 F. 2d at 790. When the matter was remanded, the Chicago Board found that the film is not obscene, and in August 1961 issued a permit for its exhibition.* Under the circumstances the part of the opinion reprinted in Appellee's Appendix 12 should not be given consideration.

Appendices 14, 15, 16, 17, 18 and 19 to Appellee's brief are copies of the State's proposed exhibits, four of which were merely marked for identification on the trial of the case against Jacobellis, and all of which were withdrawn from the record during the trial, on the State's own motion (p. 1178, typewritten trial record). In the body of its answering brief the Appellee refers to four of those appendices as support for its statement of the facts of the case (Appellee's brief p. 2). The attorney for the State of Ohio is aware that the material is not properly before the Court. When the printed record on this appeal was being prepared by the Deputy Clerk of this Court, a question was raised with respect to the inclusion of Exhibit 8A (Appendix 18). The State's attorney agreed that the Exhibit, having been withdrawn, should not be included in the printing.

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*The Appellant's attorney had been advised that the case he presented as authority had been overruled. He was also aware that the film was finally found not obscene by the responsible administrative agency in the case. Both facts were called to his attention before the Appellee's brief was prepared. Canon 22 of the Canons of Professional Ethics provides "It is not candid or fair for the lawyer * * * with knowledge of its invalidity, to cite as authority a decision that has been overruled * * * These and all kindred practises are unprofessional and unworthy of an officer of the law charged, as is the lawyer, with the duty of aiding in the administration of Justice." Canons of Professional Ethics, American Bar Association, October, 1948.

In answer to the Appellee's contentions (in Point I of its brief): (1) that there is no conflict between §2905.34 of the Ohio Revised Code as construed when Appellant was convicted and the statute as it was construed when Appellant's conviction was affirmed; and (2) that Appellant was benefited and not prejudiced by the change in the interpretation of the law.

The State of Ohio concedes (at page 7 of its brief) that at the time of the Appellant-Jacobellis' trial "the authoritative interpretation" of §2905.34 was set forth in *State* v. *Mapp,* 170 Ohio St. 427, and that the trial court followed that construction. It will be recalled that in *State* v. *Mapp* the Ohio Supreme Court held that it was not necessary to show illicit purpose in order to convict one of violating §2905.34 of the Ohio Revised Code. On the appeal from Jacobellis' conviction the Ohio Supreme Court held, in the syllabus written by the Court, that both *scienter* and *mens rea* (guilty purpose) "must be established by proper evidence to sustain a conviction for violation of such section." (R. 511, *State* v. *Jacobellis,* 173 Ohio St. 22.)

The Appellee argues that the different interpretations of the statute in the *Mapp* and *Jacobellis* opinions are not in conflict; for, it reasons, the Ohio Supreme Court in ruling, in *Mapp,* that the proscribed conduct was punishable despite the absence of culpable intent, did not bar punishment of the same conduct done with wrongful intent (Appellee's brief pp. 7-9).

We cannot agree that the Ohio Court's ruling in *State* v. *Mapp,* 170 Ohio St. 427, that Section 2905.34 of the Ohio Revised Code *does not* require a showing of wrongful purpose, is consistent with its later determination that the same statute *does* require a showing of "a guilty

or wrongful purpose". (*State* v. *Jacobellis*, 173 Ohio St. 22 at p. 27).

The Appellee also argues that Jacobellis was not prejudiced, but was aided by the changed construction of the statute adopted in the opinion affirming his conviction (*State* v. *Jacobellis*, 173 Ohio St. 22), for under that interpretation the State was required to prove an additional element, namely guilty purpose, in order to convict one of violating the statute (Appellee's brief pp. 8-9).

The State's argument that Jacobellis was benefited by the requirement that another element be proved to obtain a conviction under the statute, fails to take account of the fact that the element of intent was not added until after Jacobellis' conviction.

The prejudice resulting from the affirmance of Jacobellis' conviction under a changed construction of the law was the denial to him of a trial under the law, or version of the law, held to justify his conviction. If, as the Ohio Supreme Court ruled, Section 2905.34 as applied to the indictment against Jacobellis, required proof of illicit purpose, he was entitled to be tried under that interpretation. The trial court, clearly, followed a different construction of the law (R. 12). Even if Jacobellis had, as the Appellee claims, acted wilfully in the belief that his conduct violated the law*, he was nevertheless entitled to a trial according to the law as the Ohio Supreme Court construed it in his case.

In *Screws* v. *United States* (1945) 325 U. S. 91 the petitioners were convicted of violating the Civil Rights Law. The trial court did not charge the Jury that the statute required a showing of wrongful intent on the part of the

* It may be noted, though not relevant to the discussion, that the evidence was to the contrary.

accused, and it does not appear that the statute had, before the *Screws* case, been construed to require the showing of wrongful intent. To immunize the statute against attack on the ground that it was unconstitutionally vague, this Court on reviewing Screws' conviction, interpreted the statute to require a showing of "bad purpose". 325 U. S. at pp. 103-104.* Though the validity of the governing statute was reaffirmed in *Screws* v. *United States* (1945) 325 U. S. 91, the defendant-petitioner's conviction was set aside, for the triers of the facts in the case had not been properly instructed with respect to the applicable law. The Government claimed in *Screws* (with justification in that case) that even though the jury had not been advised that such proof was necessary, the requisite evil intent on the part of the defendants had been fully proved at the trial. The Court found that the defendants' probable guilt of wrongful purpose did not alter the fact that they were entitled to be, and they had not been, judged by persons who were correctly informed with respect to the requirements of the statute before they found the defendants guilty of violating it. *Screws* v. *United States* (1945) 325 U. S. at pp. 106-7.

James v. *United States* (1961) 366 U. S. 213 presents a situation analogous to the one in the instant case. In that case the defendant was charged, under a penal provision of the Internal Revenue Code, and was convicted, of the crime of tax evasion, because he failed to report and pay an income tax on money that he had embezzled. Before the alleged crime was committed, the Court ruled in *Commissioner* v. *Wilcox* (1946) 327 U. S. 404, that embezzled funds

* We refer to the prevailing opinion in the case written by Mr. Justice Douglas and concurred in by three other members of the Court.

did not constitute taxable income. The doctrine of the *Wilcox* case was controlling at the time the defendant James was tried. This Court, on reviewing the case, overruled the *Wilcox* decision and held that embezzled funds were taxable income and that the failure to report and pay a tax on such funds should be held criminal. The majority of the Court agreed that, under the circumstances, the conviction of the defendant James should be reversed but disagreed with respect to whether the indictment should be dismissed or a new trial of the Defendant ordered. Mr. Chief Justice Warren, in an opinion in which Mr. Justice Brennan and Mr. Justice Stewart concurred, expressed the view that the changed interpretation of the penal law could only be given prospective effect, and that the Defendant James should not be retried, for he could not be guilty of willful violation of a statute if the alleged offense was not, at the time it was committed, within the purview of the law.* "We believe" Mr. Justice Warren wrote, "that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed. Therefore, we feel

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* Mr. Justice Harlan in an opinion in which Mr. Justice Frankfurter joined, voted to overrule *Wilcox*, to reverse the defendant's conviction and to remand the case for a new trial. The defendant had been tried by a District Court Judge, without a jury. Although there was sufficient evidence to justify the opinion that the defendant had not relied on the interpretation of the statute in *Wilcox*, and had wilfully violated the penal statute (366 U. S. at p. 241, opinion of Mr. Justice Clark) Justices Harlan and Frankfurter believed a new trial was appropriate because of "the failure of the trial court, as trier of the facts, to consider whether misapprehension may have existed in the mind of the petitioner as to the applicable law, in determining whether the Government had proved that petitioner's conduct had been willful as required by the statute." 366 U. S. at p. 248.

that petitioner's conviction may not stand and that the indictment against him must be dismissed." (366 U. S. at pp. 221-2).

In the case at bar the scope of the penal statute was not limited in its application by reason of the controlling interpretation of the statute when the Appellant was tried (as in *James*), but the statute as then construed, violated the Federal constitution and was of no effect. (See discussion at pp. 17-21, 24 of Appellant's main brief.) The interpretation of the statute in *State* v. *Mapp*, 170 Ohio St. 427 was then as much part of the statute "as if it had been so amended by the legislature" *Winters* v. *New York* (1948) 333 U. S. 507, 514. The subsequent reinterpretation, given to save the statute, could not make felonious an act that was not in violation of any valid law at the time it was committed.

The question (discussed in Point II of appellant's brief) of whether §2905.34 on its face abridges the freedom of the press, is presented in the jurisdictional statement and is properly before the Court.

The State of Ohio objects to the Court's consideration of invalidity of the statute on its face. It contends the question was not presented in Appellant's Jurisdictional Statement, and to prove the omission, the Appellee's brief purports to summarize the questions that were raised in the Jurisdictional Statement. The following is from the Appellee's summary (at page 12 of its brief):

> "Question Nos. (1) (2) and (6) present questions concerning 'Section 2905.34 of the Revised Code * * * *as applied in this case*' " (matter omitted and emphasis as in Appellee's brief).

There is a vital omission in the Appellee's summary of the question (6)*. While it is technically true that the questions 1, 2 and 6 raise issues concerning §2905.34 *as applied*, question 6 of Appellant's Jurisdictional Statement also raises the question:

> "*Whether Section 2905.34 of the Ohio Revised Code on its face* and as construed and applied in this case *infringes the right of communication protected by the First and Fourteenth Amendments . . .*" (emphasis added)**.

In the discussion of the invalidity of §2905.34 on its face, it is shown, in Appellant's main brief, that there are a number of patently discriminatory exceptions to and exemptions from the statute, and it is submitted that the section contravenes the equal protection clause of the Fourteenth Amendment. The State of Ohio contends (at pages 16-17 of its brief) that the Appellant may not challenge the constitutionality of §2905.34 on the ground that it is discriminatory and denies equal protection of the laws, because the question was allegedly not raised in Appellant's Notice of Appeal. It is, of course, unnecessary to set forth in the notice of appeal each ground that Appellant intends to assert in support of his position on the principal question, *Dewey* v. *Des Moines* (1899) 173 U. S. 193, 197-8. Moreover, the question was presented in Appellant's Notice of Appeal.*** (see footnote page 9)

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* Distorting the language or argument of opposing counsel (whether the distortion is by omission or misquotation) is also condemned by Canon 22 of the Canons of Professional Ethics.

** The question is not expressed in the terms and circumstances of the case since it relates to the validity of the statute apart from its application in the case.

The Appellee's contention, that the Court below was not given an opportunity to pass on the claim that "The Lovers" is not obscene (judged in accordance with constitutional standards) is untenable.

The Appellee objects to a consideration of the question discussed in Point III of Appellant's brief on the ground that the Appellant Jacobellis did not ask the Ohio Supreme Court to reconsider its judgment. Appellee's brief indicates (at p. 24) that Ohio law permits an application for rehearing, that Jacobellis' attorney wrote a letter stating that he intended to petition for rehearing and that he thereafter advised the Ohio Court that he did not intend to do so. The Appellee concludes that because Jacobellis did not ask for a rehearing, the Ohio Supreme Court was not given an opportunity to pass on the claim that its judgment with respect to the film was erroneous (Appellee's brief p. 25).

The Appellee's objection is untenable. One is not required to petition for a rehearing by the State Court, where the granting of rehearing is discretionary, as it is in Ohio, *Market St. R. Co.* v. *Railroad Com. of Cal.* (1944) 324 U. S. 548; *Teamsters Union* v. *Lucas Flour Co.* (1961) 369 U. S. 95, 101; *Tuck* v. *Chapple* (1926) 114 O. S. 155, 151 N. E. 48. In *Market St. R. Co.* v. *Railroad Com. of Cal.* (1944) 324 U. S. 548, this Court said of the right of a State Court to reconsider its judgment upon petition for rehearing (at pp. 551-2) "Such latent powers of the State Courts

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* * * Notice of Appeal. "The following questions are presented by this appeal

"3. Whether Appellant was deprived of the right of communication, and of equal protection of the laws, . . . in violation of the First . . . and Fourteenth Amendments to the Constitution . . . , the Appellant having been convicted of possessing and also of exhibiting a motion picture entitled "The Lovers", . . . which film was judged obscene . . . in accordance with stricter standards than are applied to other publications" (R. 521-2).

over their judgments are too variable and indeterminate to serve as tests of our jurisdiction."

The federal question under discussion is, simply, whether the film "The Lovers" is obscene. The conviction of a person for exhibiting an allegedly obscene film is an infringement of the freedom of the press, if the film is not obscene within the definition outlined in *Roth* v. *United States* (1957) 354 U. S. 476. See *Smith* v. *California* (1959) 361 U. S. 147, 152. Since the federal question involves the judgment made by the Ohio Supreme Court it obviously cannot be said that the Court did not pass upon the question. *Whitfield* v. *Ohio* (1936) 297 U. S. 431, 436.

The Appellee also states (at page 25 of its brief) that the issue discussed in Point III of Appellant's main brief is not properly before the Court because it was not raised by Jacobellis in any of the Ohio Courts. The Appellee's statement, that the issue was not raised in any of the Courts below, is irrelevant, and it is factually incorrect. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley* v. *Ohio* (1959) 360 U. S. 423, 436. The issue was raised in Jacobellis' brief in the Supreme Court of Ohio, and in his brief in the Ohio Court of Appeals for Cuyahoga County; and every witness called by the Appellant at his trial gave testimony to show that the film is not obscene, judged in accordance with the standards prescribed by this Court.

Respectfully submitted,

EPHRAIM LONDON
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IN THE

Supreme Court of the United States

October Term, 1963
No. 11

NICO JACOBELLIS,

Appellant,

vs.

STATE OF OHIO,

Appellee.

On Appeal From the Supreme Court of the State of Ohio.

Motion for Leave to File Tardy Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

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IN THE

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October Term, 1963
No. 11

NICO JACOBELLIS, *Appellant,*

vs.

STATE OF OHIO, *Appellee.*

On Appeal From the Supreme Court of the State of Ohio.

Motion for Leave to File Tardy Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience, *amicus curiae* is hereinafter referred to by the single short title, CDL.

The formulation of CDL grew out of an impelling demand on the part of the larger segments of society, especially responsible fraternal, civic and religious organizations, which seek to bring under control the nationwide dissemination of obscene literature.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its recent national convention in Chicago during October 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case. Such action made possible, for the first time, the filing of the brief referred to herein.

Nico Jacobellis v. State of Ohio is a motion picture film case of nationwide and historical importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation. This Court's recent action in restoring the Jacobellis case to the calendar for further argument has prompted CDL to request leave of Court to file a tardy brief *amicus curiae* in support of appellee herein.

The consent of counsel of record for appellee has been obtained and has been filed with the Clerk. Counsel of record for appellant has indicated an unwillingness to consent to such filing.

CDL believes that its brief in this case can assist this Court in its determinations on the following principles of law:

(1) The "scienter" provision of section 2905.34 of the Ohio Revised Code, as construed in the opinion of the court below, is consistent with the "scienter" requirement announced by this Court in *Smith v. California*, 361 U. S. 147 (1959).

(2) The construction of section 2905.34 of the Ohio Revised Code, adopted by the court below (that the phrase "knowingly possess" required the element of *mens rea*, namely, a guilty or wrongful purpose, and the phrase "in his possession or under his control" required possession and control for the purpose of circulation or exhibition) is binding on this Court. A similar proscription was approved by this Court in *Alberts v. California*, 354 U. S. 476 (1957).

(3) The construction of section 2905.34 of the Ohio Revised Code, adopted by the court below (that the phrase "in his possession or under his control" required possession and control for the purpose of circulation or exhibition) describes a crime which is in the nature of an "attempt." A *successful* "attempt", will not support two convictions.

(4) Those provisions of section 2905.34 of the Ohio Revised Code which have no application to the limited facts in this appeal, are not subject to review by this Court in advance of an actual controversy.

(5) The trial court, in finding the motion picture film, "The Lovers" obscene, applied proper constitutional standards (*i.e.*, the standards prescribed by this Court in *Roth v. U.S.* and *Alberts v. Calif. (supra)*). Such standards do not contemplate involvements in "hard-core pornography" concepts or "clear and present danger" tests.

(6) The determination of obscenity is primarily an issue of fact. Constitutional review in this matter is limited to the question, "Whether reasonable minds could differ beyond a reasonable doubt that the motion picture film, 'The Lovers' is obscene."

In light of the above, motion is therefore made for leave to file a brief amicus curiae in support of the appellee in the above-entitled cause.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1963.
No. 11.

NICO JACOBELLIS,
Appellant,

vs.

STATE OF OHIO,
Appellee.

On Appeal From the Supreme Court of the State of Ohio.

Brief Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Appellee.

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Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience amicus curiae is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the court-room advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

As its recent national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case. Such action made possible, for the first time, the filing of the brief referred to herein.

Nico Jacobellis v. State of Ohio is a motion picture film case of nationwide and historical importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of Facts.

Appellant, manager of the Heights Art Theater in Cleveland Heights, Ohio, was indicted by the County Grand Jury and convicted by a three-judge trial court for separate counts of "possession" and "exhibition" of the film "The Lovers." The trial court found the

film to be an obscene motion picture within the meaning of Section 2905.34 of the Ohio Revised Code. Appellant had waived his right to a trial before a jury, drawn from the county.

The holding of the trial court and the pertinent language in its opinion is set out below:

> "It is the unanimous finding of the Court that the motion picture film in issue is obscene, lewd and lascivious within the definition, description, and test set forth in *Roth v. United States* (June 24, 1957), 354 U.S. 476, 1 L. ed. 2d 1498, 77 S. Ct. 1304. 'Les Amants' (or The Lovers) has relation to sexual impurity and has a tendency to excite lustful thoughts. Again, it has a substantial tendency to deprave or corrupt its viewing audience by inciting lascivious thoughts and arousing lustful desires. Finally, the dominant theme of this film, when taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest. It is further found that the defendant acted unlawfully and knowingly in having in his possession and under his control and exhibiting this motion picture film."

The appellant was sentenced to pay a fine of $500.00 on the "possession" count and $2000.00 on the "exhibition" count.

The trial court decision was affirmed by the three-judge district appellate court (3-0), and by the seven-judge highest court of the state (6-1), all of whom viewed the film on appeal.

Summary of Argument.

Having had a full hearing in the State Court, under *Roth* principles, appellant now seeks to upset this final judgment of the highest court in Ohio, by resurrecting the same issues firmly put to rest by this Court in the *Roth* decision, less than six years ago.

Amicus CDL contends that the judgment of the court below, except as stated in Point III of the Brief herein, is correct in every respect and should be affirmed. We contend that:

(1) The "scienter" provision of section 2905.34 of the Ohio Revised Code, as construed in the opinion of the Court below, is consistent with the "scienter" requirement announced by this Court in *Smith v. California*, 361 U. S. 147 (1959).

(2) The construction of section 2905.34 of the Ohio Revised Code, adopted by the Court below (that the phrase "knowingly possess" required the element of *mens rea*, namely, a guilty or wrongful purpose, and that the phrase "in his possession or under his control" required possession and control for the purpose of circulation or exhibition), is binding on this Court. A similar proscription was approved by this Court in *Alberts v. California*, 354 U. S. 476 (1957).

(3) The construction of section 2905.34 of the Ohio Revised Code, adopted by the Court below (that the phrase "'in his possession or under his control" required possession and control for the purpose of circulation or exhibition), describes a crime which is in the nature of an "attempt". A

successful "attempt" will not support two convictions.

(4) The remaining provisions within section 2905.34 of the Ohio Revised Code, which have no application to the facts of the present case, are not subject to review by this Court in advance of an actual controversy.

(5) The trial court, in finding the motion picture film, "The Lovers" obscene, applied proper constitutional standards (*i.e.*, the standards prescribed by this Court in *Roth v. United States* and *Alberts v. California (supra)*). Such standards do not contemplate involvements in "hard-core pornography" concepts or "clear and present danger" tests.

(6) The determination of obscenity is primarily an issue of fact. Constitutional review in this matter is limited to the question, "Whether reasonable minds could differ beyond a reasonable doubt that the motion picture film, 'The Lovers' is obscene."

ARGUMENT.

I.

The "Scienter" Provision of Section 2905.34 of the Ohio Revised Code, as Construed in the Opinion of the Court Below, Is Consistent With the "Scienter" Requirement Announced by This Court in Smith v. California, 361 U. S. 147 (1959).

A. The People's Burden of Proof on the Issue of "Scienter" Is "Knowledge of the Contents."

A classic case establishing "scienter" is one in which a defendant has *read* the book, *looked at* the picture, or as here, *viewed* the motion picture film, prior to offering the subject matter to the public for circulation or distribution. A person must take notice of what in this enlightened age, a community will deem to be obscene.[1] The prosecution need not prove as a part of their case that the defendant was aware of the tendency of his material when it is shown that he knows the contents.[2] This question was clearly decided by this Court some 67 years ago in *Lew Rosen v. United States*, 161 U. S. 606 (1896).[3] When a person knows

[1]This Court said in *Roth v. U. S.*, 354 U. S. 476, 490, fn. 28: "This Court, as early as 1896, said . . . : . . everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity, in social life, and what must be deemed obscene, lewd, and lascivious. *Rosen v. United States*, 161 U. S. 29, 42 . . ."

[2]Since under the law, obscene material is such because it can be said a reasonable person in the community would find it so, to permit exhibition of such material without penalty by a person who knows the content, is to permit that person to act unreasonably.

[3]"Undoubtedly the mere depositing in the mail of a writing, paper, or other publication of an obscene, lewd or lascivious character, is not an offense under the statute if the person making the deposit was, at the time and in good faith, without

(is aware of) the content of the subject matter he offers for sale, he may not be heard to say, "I didn't know (subjectively) the film was obscene."

The draftsmen of the Model Penal Code of the American Law Institute state very clearly that under prevailing case law it is necessary only to prove that the defendant knew of the *presence* of the objectionable material and that it is not necessary to prove that a defendant was subjectively aware of the evil tendency of the material.[4] In another effort to alter[5] ruling

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knowledge, information, or notice of its content. The indictment would have been in better form if it had more distinctly charged that the accused was aware of its character. . . . The indictment on its face implies that the defendant owned or managed the paper 'Broadway'. He admitted at the trial that he owned and controlled it. He did not pretend that he was ignorant at the time of the contents of the particular number that he caused to be put into the postoffice at New York. *The general charge* that he 'unlawfully, wilfully, and knowingly deposited and caused to be deposited in the post office . . . a certain obscene, lewd, and lascivious paper' — describing it by its name, volume, number, date of trademark, date of issue, and as having on it the name of Lew Rosen, proprietor, the same name borne by the defendant, — *may not unreasonably be construed as meaning that the defendant* was, and *must have been, aware of the nature of its contents at the time* he caused it to be put into the post office for transmission and delivery. . . ." *Rosen v. U. S.*, 161 U. S. 606, 607 (1896) (Our emphasis.)

[4] "14. Mens Rea: Presumptions of Knowledge or Purpose. Under prevailing obscenity laws, the prosecution must prove that defendant knew or, at least, was reckless as to the presence of objectionable material in a book or other publication disseminated by him. It does not have to prove that defendant was aware of the evil tendency of the material." American Law Institute, Model Penal Code, Tentative Draft No. 6, section 207.10 (1957), Reporter's Notes at page 49.

[5] The drafters also took a position contrary to the overwhelming body of case law authority on the issue of the respective functions of a court and jury in an obscenity trial. This was rejected by the Council of the American Law Institute. Compare the extensive annotation following *United States v. Limehouse*, 285 U. S. 426, entitled, "Respective Functions of Court and Jury in Determining Criminality vel non of

case law (in this case the ruling authority is the United States Supreme Court's decision in *Rosen, supra*), the 1957 draftsmen suggested certain presumptions against the defendant. At the same time however, the reporter's notes recognized the prevailing law of the land, at page 50:

> "Our recommendation may seem hard on the defendant unless one bears in mind that prevailing law is even rougher, absolutely precluding any defense[6] based upon defendant's misappraisal of the tendencies of his material. There is much to be said in favor of the present law. The issue of defendant's knowledge or recklessness of the prurient character of his material is likely to turn largely on the jury's acceptance or disbelief of his testimony as to his own state of mind. Some defendants will not take the witness stand so that they can't make the defense. When made it is hardly likely to be persuasive against the fact that the material is such as to be judged predominantly prurient by the reactions of ordinary men."

Matter", and the reporter's note 13 at page 46 of the 1957 draft. This "silent revolution", within the ALI, against the existing standards in ruling case law appears to have been spearheaded by the same justices which lead the attack in the court room. See fn. 50.

[6]In *Schindler v. U. S.*, 208 F. 2d 289 (9th Cir., 1953) the circuit court of appeals, citing *Rosen v. U. S. (supra)*, sustained the exclusion of evidence offered by defendant to show that he had consulted an attorney as to the propriety and lawfulness of distributing the allegedly obscene books. This type of bootstrap defense is irrelevant under *Roth v. U. S.* Obscenity is a factual issue and one "must take notice of what in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd and lascivious." See footnote 1.

There is, however, no indication in the majority opinion in *Smith v. California*, 361 U. S. 147 (1959), that this Court viewed the common law "scienter" requirement of "knowledge of the contents," expressed in *Rosen v. U. S.*, *supra*, as inadequate or oppressive. In the *Smith* case, the same test, *"awareness of its contents"*, was regarded as the extent of the prosecutor's burden.[7] The *Smith* court regarded the common law precedent as *strictly* meeting the scienter requirement.[8]

Neither Justice Frankfurter's concurring, nor Justice Harlan's concurring and dissenting minority opinions in the *Smith* case give aid to appellant here. Both opinions viewed the defendant as having a constitutional right to introduce evidence bearing on *community standards* only as related to the issue of "obscenity".[9]

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[7]"It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim knowledge of their books' contents or falsely deny reason to suspect their obscenity. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law, 68 Harvard L. Rev. 1. *Cf. American Communications Association v. Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness* of its contents. The circumstances may warrant the inference that he was *aware* of what a book contained, despite his denial." *Smith v. U. S.*, 361 U. S. 147, 154 (1959). (Our Emphasis.)

[8]"Common law prosecutions for the dissemination of obscene matter strictly adhered to the requirement of scienter. . . ." *Smith v. U. S.*, 361 U. S. 147, 153, fn. 9 (1957).

[9]Justice Frankfurter speaking in *Roth v. U. S.*, 361 U. S. 147, 165: "Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. U. S.*, 354 U. S. 476, 489, 1 L. Ed. 2d 1498, 1509, 77 S. Ct. 1304, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light

For those Justices to hold such evidence on "community standards" as constitutionally compelled, is not to say that they would alter the "scienter" requirement, or make of it a subjective test. To suggest that Justice Harlan would modify the "scienter" rule expressed in the *Rosen* case is unwarranted and patently illogical, in view of his expression in *Smith* that he *would not* strike down the Los Angeles City ordinance (though it lacked the requirement of "scienter"). He would have reversed the conviction and remanded the case for a new trial to permit the defendant to introduce evidence on *community standards*. Had his view been followed, the people would not have had any burden on the issue of "scienter".

Appellant's subtle argument, unmasked, is this: While reluctantly recognizing that the *Roth* decision is precedent and solid authority that the word "obscene" is not vague and does establish an ascertainable standard of guilt,[10] nevertheless, he resumes the attack

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to be shed on what those 'contemporary community standards' are . . . ."

Justice Harlan speaking in *Roth v. U. S.*, 361 U. S. 147, 172: "In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards. . . . On this ground I would reverse the judgment below, and remand the case for a new trial . . ."

[10]"These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . 'boundaries sufficiently distinct for judges and juries fairly to administer the law. . . .'" *Roth v. U. S.*, 354 U. S. 476, 491 (1957) "In summary, then, we hold that *these statutes*, applied according to the proper standard for judging obscenity, *do not* offend constitutional safeguards against convictions based upon protected material, or *fail to give men in acting adequate notice* of what is prohibited . . ." *Roth v. U. S.*, 354, U. S. 476, 492 (1957). (Our emphasis.)

against *Roth* collaterally, by arguing that he cannot be convicted, because he *personally* does not "know" obscenity when he sees it.

B. The Test for "Scienter" Is Whether the Accused Knew or Should Have Known of the Obscene Nature of the Material Involved.

It can be said that an accused should have known of the obscene nature of the material involved where he was aware of the nature of the subject matter (in this case, knew the contents of the film), for a person must take notice of what, in this enlightened age must be deemed to be obscene.

Amici American and Ohio Civil Liberties Unions, hereinafter referred to as ACLU, argue for appellant in their brief at page 45 that this Court's grave concern "cannot be washed away in obscenity cases by a simple requirement that the accused know only the contents of the material involved. . . . Such a rule of *scienter* would be as great a deterrent to free expression as no *scienter* requirement at all. Under such a rule, the disseminator of ideas would be criminally liable regardless of his judgment, . . . regardless of the circumstances and factors existing at the time he made his judgment, and regardless of the complexity of the problem of making a judgment. He would guess wrong at his peril; . . ." (Emphasis theirs.)

But the conclusive answer to this suggestion was given by Justice Holmes:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may

he incur a fine or a short imprisonment, as here; he may incur the penalty of death."[11]

The law does not protect against such a hazard. The defendant must take notice of what in this enlightened age a community will deem obscene,[12] and of course he runs the risk of having a jury of his peers misjudge him.

This Court's holding in *Wieman v. Updegraff*, 344 U. S. 183 (1952), is not precedent for the "scienter" rule proposed by ACLU.[13] The question in that case was, "whether the due process clause permits a state, in attempting to bar disloyal individuals from its employ, to exclude persons solely on the basis of organizational membership, *regardless of their knowledge* concerning the organizations to which they had belonged."[14] That case does not suggest that a statute would be bad if the individual were required at the time of membership to have knowledge of the facts upon which the organization was adjudged to be subversive. In such a case he would not be heard to argue that in *his judgment* of the facts, the organization is not subversive and that, therefore, he does not have "knowledge". Appellant here *did have knowledge of all of the facts* upon which "The Lovers" was adjudged to be obscene. His poor judgment is no saving grace.[15]

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[11]Justice Holmes speaking in *Nash v. U. S.*, 229 U. S. 373, 377.

[12]See fn. 1.

[13]ACLU suggests a vague "subjective knowledge" as the test for "scienter". ACLU brief, page 44. Such a rule is decidedly against the social interest in order and morality and would operate as a guarantee to the amoral person that he could not be prosecuted.

[14]344 U. S. 183, 190.

[15]That his judgment was bad in the extreme is attested to by the findings of the three judges as triers of the fact and

C. The Scienter Provision of Section 2905.34 of the Ohio Revised Code, as Construed in the Opinion of the Court Below, Is Consistent With the "Scienter" Requirment Announced by This Court in Smith v. California, Supra.

The trial court specifically found in its memorandum opinion: "That the defendant acted unlawfully and knowingly in . . . exhibiting this motion picture film." *State v. Jacobellis*, 175 N. E. 2d 123 at page 125. The court below affirmed this ruling.[16]

There was ample evidence to support the findings that the appellant knew or should have known the

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the findings of the Ohio jurors in Montgomery County in *Ohio v. Warth*, 173 Ohio State 15, concurred in by the court below in 179 N. E. 2d 777, 781. (See also 179 N. E. 2d 772.)

[16]"The question, of course, is knowledge of what? It is apparent that such knowledge must necessarily relate to knowledge of the obscenity of the contents of the publication involved." *State v. Jacobellis*, 179 N. E. 2d 777, 779. "While the posessor should not be held to the impossible, where the contents of a given publication have become a matter of common knowledge and are generally known to be obscene as judged by the above test, then the duty devolves upon the holder of such publications to refrain from distributing or exhibiting them and to destroy them as soon as he may practically do so; otherwise he will then become guilty under section 2905.34, Revised Code.

"Thus it is only when a holder of such matter becomes aware of or should be aware of the contents and the objectionable nature thereof that he would become liable to prosecution under this section. . . ." *Ohio v. Jacobellis*, 179 N. E. 2d 777, 780. See also *Chobot v. Wisconsin*, 106 N. W. 2d 286, 291, appeal dismissed for want of a substantial federal question in 368 U. S. 15 (1961), Black, Douglas and Harlan were of the opinion probable jurisdiction should be noted.

film was obscene when he exhibited it.[17] Appellant promoted "The Lovers" in the local daily papers with a photograph which suggests sexual intercourse as the central theme and advertised it as such.[18] ("Conventions explode," "Contains one of the longest and most sensuous love scenes to be seen *in this country*" (our emphasis), "Something of a sexual revolution.") Prior to the exhibition on November 13, appellant read the film review by W. Ward Marsh of the Cleveland Plain Dealer which condemned the film as obscene.[19] At the time of the exhibition, the appellant knew the contents (had viewed the film) and since by the verdict of the fact finders, a reasonable man in the community would have considered it obscene, appellant, as a reasonable man, must have known the film was obscene.[20]

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[17]We consider here only the conviction for the crime of "knowingly exhibiting an obscene film." In our view the second count, "knowingly possess for the purpose of exhibiting" is an "attempt" crime and a conviction for a successful attempt will not support two convictions in the area of free speech. See Point III.

[18]See Answer Brief of Appellant, Appendix 13, 14, 15, 16 and 17.

[19]"The verdict here: a dull picture until it turns to screened pornography . . . Suppose for the moment I condone its pornographic sequences—which I do not!—there are other entirely distinctive moral issues which are almost as unacceptable, or will be unacceptable, to people who consider themselves as decent folk. . . 'The Lovers' lights every censorship torch. . . ." Review by W. Ward Marsh, as reproduced in Answer Brief of Appellant, page 4 and Appendix 18.

[20]"It may fairly be assumed that one who has reason to believe a fact exists, knows it. exists. Certainly if he be a reasonable being" Justice Strong speaking in 101 U. S. 557. Appellant's claim that the Bureau of Customs passed the film and that the film was shown in other cities is unavailing. There is abundant authority in this Court that administrative persons, bodies or agencies are not proper judges of community standards. See *Bantam Books Inc. v. Sullivan*, 372 U. S. 58 (1963) and the 1958 *per curiam* reversals.

II.

The Construction of Section 2905.34 of the Ohio Revised Codes, Adopted by the Court Below (That the Phrase "Knowingly Possess" Required a Guilty or Wrongful Purpose and the Phrase "in His Possession or Under His Control" Required Possession and Control for the Purpose of Circulation or Exhibition) Is Binding on This Court. A Similar Proscription Was Approved in Alberts v. California, 354 U. S. 476 (1957).

From 1910 to 1939, Section 13035, General Code (now Section 2905.34, Revised Code) provided as follows:

> "Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession *for such purpose*, an obscene, lewd or lascivious book. . . ." (Our emphasis.)

In 118 Ohio Laws 420 (1939), the emphasized words were stricken and the words, "or has under his control," were inserted in their place. In 120 Ohio Laws 230 (1943), the word, "knowingly", was inserted after the opening word, "Whoever." In the same act, Section 13035.1, General Code (now Section 2905.35, Revised Code) was passed, providing for the issuance of search warrants for suspected violation of the preceding section and also providing for the disposition of articles seized under such warrants.[21] Without judicial interpretation, it could not be said what effect the combined change (*i.e.*, addition of the new language "or under his control," the deletion of the old language "for

[21] See *State v. Mapp*, 170 Ohio State 427, 435 (1960).

such purpose" and the addition of search warrant provisions) had on the "possession" crime.[22]

The majority in the court below, in construing the phrase "in his possession or under his control" and its relation to the rest of the section applied the doctrine of "noscitur a sociis" to the ambiguity and read an equivalent phrase "for the purpose of circulation or exhibition" back into the statute, and interpreted the "knowingly" element as having the element of *mens rea*, "a guilty purpose", as implied limitations on the "possession" crime.[23] Limitations by implication through statutory construction are not objectionable.[24]

The views of the court below, in respect to the above construction of the Ohio statute, are completely nonreviewable by this Court. Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court on appeal *must* accept the state court's construction of the statute and proceed to test the validity on that basis. *General Trust Company v. Blodgett*, 287 U. S. 509, 513; *Kingsley Pictures Corporation v. Regents*, 360 U. S. 684, 688.[25]

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[22]"Control" and "possession" have different meanings in criminal law. See the distinction drawn by Professor Rollin M. Perkins in the crime of larceny, Perkins on Criminal Law, The Foundation Press, Inc. (1957), 196, 199. The addition of "under his control" appears to have broadened the "possession" provision. Whether the omission of the words "for such purpose" was purposeful or inadvertent is not clear.

[23]Judge Taft in his separate opinion in the court below, thought the deletion of "for such purpose" by the Legislature in 1943, precluded reading an equivalent phrase back into the statute as did the majority opinion. Judge Taft's contrary interpretation does not appear to be required.

[24]In the obscenity area see *People v. Finkelstein*, 183 N. E. 2d 661, Petition for Writ of Certiorari denied in 9 L. Ed. 2d 100 (1962). Justice Douglas was of the opinion that certiorari should be granted.

[25]This Court said in the *Kingsley Pictures Corporation* case, involving New York's obscenity statute and the motion picture

The "possession" prohibition of Section 2905.34, as construed by the court below, requires proof that a person "knowingly (with guilt or wrongfully) possessed an obscene motion picture film for the purpose of circulation or distribution." An equivalent of this proscription[26] was upheld by this Court in *Alberts v. California*, 354 U. S. 476, 494 (1957).[27]

III.

The Construction of Section 2905.34 of the Ohio Revised Code, Adopted by the Court Below (That the Phrase "In His Possession or Under His Control" Required Possession and Control for the Purpose of Circulation or Exhibition) Describes a Crime Which Is in the Nature of an "Attempt." A Successful "Attempt" Will Not Support Two Convictions.

Whether or not the affirmance by the court below of appellant's conviction on the "possession" count was grounded upon a different and conflicting interpretation of the statute than that of the trial court[28] need

film "Lady Chatterley's Lover", at page 688. "We accept the premise that the motion picture here in question can be so characterized. We accept too, *as we must*, the construction of the New York Legislature's language which the Court of Appeals has put upon it. . . ." (Our emphasis.)

[26]Under California Penal Code Section 311, to "wilfully and lewdly" keep for sale an obscene book was a misdemeanor. By judicial interpretation in California, a lewd intent might be inferred from knowledge where the evidence indicates defendant's knowledge of the character of the writing, etc. which he kept for sale. *People v. Wepplo*, 178 P. 2d 853, 857, 858.

[27]"The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material." *Alberts v. California*, 354 U. S. 476, 494 (1957).

[28]The trial court's ruling on appellant's demurrer [R. 12] established *only* that the "possession" count stated a crime.

not be decided.[29] The conviction on the "possession" count must be reversed for other reasons.

The court below construed the "possession" provision of Section 2905.34 to require more than mere possession, *i.e.*, knowing possession "for the purpose of circulation or exhibition." The court said: "He could only be said to violate the law when and if he forms the purpose to use, exhibit or sell it wrongfully, in other words, forms the mens rea and *acts* in furtherance thereof." (Our emphasis.) Under the construction placed on this portion of the Ohio statute, the appellant stands convicted of *an "attempt"*[30] *to exhibit* an obscene motion picture film, a statutory offense related to the "exhibition" offense. While both counts (the possession for the purpose of exhibition and the

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Appellant by pure hypothesis pyramids the trial court's citation of *Ohio v. Mapp*, 170 Ohio State 427, in its ruling on the demurrer, into an express holding of the trial judge that syllabus 1 (the opinion of three justices in the *Mapp* case (Justices Taft, Zimmerman and Peck) was ruling case law for the facts of *this* case. As to the remaining four justices of the Ohio Supreme Court, it should be noted that Justices Matthias and Weygandt did not concur in syllabus 1 and while Bell and Herbert concurred in syllabus 1, those justices in their separate opinion at page 437 *limited their concurrence to the facts of the Mapp* case, "I would hold no brief for the defendant here *if the evidence had disclosed* a commercial purpose. . . ." (Our emphasis.) The most that appellant could expect from this argument is a determination whether appellant possessed the film *for circulation*, which the "exhibition" count conclusively established. Compare this situation with the result in *People v. Finkelstein*, 183 N. E. 2d 661, 662 (1962), certiorari denied by this Court 9 L. Ed. 2d 100 (1962), in which the New York Court of Appeals implied "scienter" into the New York obscenity statute in reviewing a court conviction. ("scienter" was not considered as an element of the crime in the trial court.)

[29]The "possession" count was good however. See Point II.

[30]A criminal attempt is an attempt to do a particular criminal thing combined with an act which falls short of the thing intended. 1 Bishop on Criminal Law, Section 728.

exhibition count) are good,[31] and the appellant may be convicted of either,[32] he may not be assessed a double penalty where he stands convicted of both. A successful attempt to commit a crime will not support two convictions and penalties—one for the attempt and the other for the completed offense.[33]

IV.

Those Provisions of Section 2905.34 of the Ohio Revised Code Which Have No Application to the Limited Facts in This Appeal, Are Not Subject to Review by This Court in Advance of an Actual Controversy.

Appellant has no standing to attack the provisions of Section 2905.34 which are unrelated to the factual situation presented herein. That this Court will not inquire into the constitutionality of a state statute in the abstract[34] (without reference to its application to the

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[31]This is in disagreement with the argument of ACLU in their brief at page 59 where they say, "Nor can it be reasonably claimed that to put mere possession *outside* the realm of punitive activity seriously hampers the state in its efforts to control traffic in pornography." (Our emphasis.) This Court approved the proscription of "possession for the purpose of circulation" in *Alberts v. U. S.*, see footnote 27.

[32]Perkins on Criminal Law, The Foundation Press Inc. page 477 (1957).

[33]For a discussion of this principle in a federal case, see *Prince v. U. S.*, 352 U. S. 322 (1957).

[34]"This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York and Philadelphia S.S. Co. v.

facts in a particular case) is a natural corollary to the rule that this Court, on appeal, must accept the state court's construction of its statute and proceed to test its validity on that basis. *Kingsley Pictures Corporation v. Regents, supra.*

A statute which does not offend due process when considered with the interpretation involved and the facts at hand, may receive different treatment than a like statute which does not have the same effect when broadly construed by a state court. That free speech and expression may be involved does not change this result.[35]

Commissioners of Immigration, 113 U. S. 33, 39. *Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U. S. v. Wurzbach, 280 U. S. 396." United States v. Raines*, 362 U. S. 17, 21 (1960). (Our emphasis.)

[35]Compare the California obscenity statute in *Smith v. California*, 361 U. S. 147 (1959) with the New York obscenity statute in *People v. Finkelstein*, 183 N. E. 2d 661, cert. den. 9 L. Ed. 2d 100 (1962) and the results reached in those cases. But more in point, compare the Michigan statute in *Butler v. Michigan*, 352 U. S. 380 (Feb., 25, 1957) with the Florida statute in *Matthews v. Florida*, 98 So. 2d 568 (Nov. 27, 1957), petition for certiorari denied by this Court in 356 U. S. 918 (1958) and the results reached in those cases. The Michigan statute read: "Any person who shall . . . sell . . . any book . . . containing obscene . . . language, or obscene . . . pictures . . ., tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of the youth . . . shall be guilty of a misdemeanor." Held to violate due process where the sale was to an adult. *Butler v. Michigan*, 352 U. S. 380. The Florida statute read: "Whoever . . . exhibits . . . any book or . . . other thing . . . containing obscene language . . . or any obscene . . . pictures or descriptions manifestly tending to the corruption of the morals of youth shall be punished by imprisonment in the state prison. . . ." (Felony.) Held, where exhibition was to a 12-year old girl, jury conviction affirmed by Florida Supreme Court (4 to 2), in a *per*

V.

The Trial Court, in Finding the Motion Picture Film "The Lovers" Obscene, Applied Proper Constitutional Standards (I.e., the Standards Prescribed by This Court in Roth v. United States and Alberts v. California). Such Standards Do Not Contemplate Involvements in "Hard-Core Pornography" Concepts or "Clear and Present Danger" Tests.

Having had their full day in the state court, under *Roth* principles, appellant and ACLU now seek to upset this final judgment of the highest court in Ohio, by resuming their 1957 attack and reopening for argument the same questions firmly put to rest by this Court less than six years ago in the *Roth* decision. ACLU concede in their brief, that "the explicit basis for the instant conviction is the Court's holding in *Roth v. United States*, 354 U. S. 476."[36] Appellant did likewise in the court below, in urging that the Ohio Supreme Court reject the Roth test as unconstitutionally vague, impractical and unworkable.[37]

If this appeal is to be placed in its proper perspective, one should ask what the review on the issue of "obscenity" might be, had the verdict of the fact finders been for the exhibitor appellant, and an appeal been

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curiam decision without opinion in 98 So. 2d 568 (Nov. 27, 1957), cert. den. by this Court in 356 U. S. 918 (1958). While it may be suggested that in the Florida case the constitutional question was not properly raised in the trial court, two dissenting justices in the Florida Supreme Court thought the *Butler* decision controlling.

[36]ACLU Brief, page 5. It could hardly be claimed otherwise in view of the language of the trial court. See Statement of Facts at page .... of this brief.

[37]See Appendix 10 in appellee's Motion to Dismiss Appeal.

taken by the people, claiming that the verdict was wrong as a matter of law.[38]

Since this Court's landmark decision in *Roth*, two principal attacks have been made on the obscenity statutes: (1) that the obscenity statutes are subject to the clear and present danger test, and (2) that the obscenity statutes' proscription extends to "hard-core pornography" only. Both are grounded upon a claim that the present Roth standards are unconstitutionally vague, impractical and unworkable. Appellant and ACLU make both attacks in this appeal.

A. "Clear and Present Danger" Is Inherent From the Definition of Obscenity and Is Not a Separate Fact to Be Proved by the People.

ACLU's probe for the clear and present danger test[39] as an additional burden of proof for the people's case is in complete disregard of all constitutional precedent, both remote and modern.[40] Justice Brennan

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[38]Or "Constitutional fact."

[39]ACLU Brief, page 6: "There is no evidence in the record that the motion picture involved in this case presents such a clear and present danger; in addition, we believe that, 'under the current state of knowledge' there is grossly insufficient evidence to show that obscenity brings about *any* substantive evil." (Their emphasis.)

[40]See Judge Learned Hand's opinion in *United States v. Rebhuhn*, 2nd Circuit, 109 F. 2d 512, 514, cert. den.; *Rebhuhn v. U. S.*, 310 U. S. 629 (1940); see also *Rosen v. U. S.*, 161 U. S. 29. A unanimous court in *Chaplinsky v. New Hampshire*, 315 U. S. 568, 571 (1941), said: "There are certain *well defined* and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which *by their very utterance inflict injury*. . . ." (Our emphasis.) Justice Frankfurter delivering the majority opinion in *Beauharnais v. Illinois*, 343 U. S. 250, 266 (1951), said the following about the clear and present danger: "Libelous utterances, not being within the area of constitutionally protected

speaking for this Court could not have answered that challenge more fully than in *Roth v. United States* at page 486:

> "The complete answer to this argument is in the holding of this Court in *Beauharnais v. Illinois, supra* (343 U. S. at 266): . . . . it is unnecessary either for us or for the state courts, to consider the issues behind the phrase 'clear and present danger.' *Certainly no one would contend that obscene speech,* for example, *may be punished only upon a showing of such circumstances.* . . ." (Our emphasis.)

ACLU nevertheless argues: "There is no evidence in the record that the motion picture film involved in this case presents such a clear and present danger; in addition, we believe that, under the current state of knowledge, there is grossly insufficient evidence to show that obscenity brings about *any* substantial evil." (Their emphasis.)

The complete answer to this, is this Court's expression in *Chaplinski v. New Hampshire,* 315 U. S. 568, 571 (1941), that the "lewd" and the "obscene" *by their very utterance inflict injuries,*[41] and in *Roth v. United States,* where this Court declared that the "lewd" and the "obscene" were inherently evil and by definition contrary to the social interest in order and morality.[42]

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speech, it is unnecessary, either for us or for the State courts, to consider the issues behind the phrase, 'clear and present danger'. *Certainly no one would contend that obscene speech,* for example, *may be punished only upon a showing of such circumstances.* . . ." (Our emphasis.) Justice Brennan reiterated this answer in *Roth v. U. S.,* 354 U. S. 476, 486 (1957).

[41] See Footnote 40.

[42] *Roth v. U. S.,* 354 U. S. 476, 485. In the words of Professor Hocking: "A published obscenity is not an idle mental image—

This universal understanding[43] is recognized by all but those who choose to disregard the lessons of history.[44] Their continuing attack clings to the *Roth* dissent that obscenity (expression) really is not punishable, only criminal action is.[45]

Can it be seriously argued that this Honorable Court does not have the power to punish expression, when other interests, including the safety of our culture, point to an overriding importance? Rule 40.5 of this Court reminds attorneys practicing before this Bar that briefs *must be free from scandalous matter* and that, as a penalty for failure to observe this restriction, the *briefs* may be *disregarded* and *stricken* by the Court. Further,

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it is a disruptive mental image, a violent displacement of the self-sense of the viewer from the region of active purpose to the region of bodily preoccupation; it intrudes upon the eye what is normally in the province of touch and concealment; it begins a psychological disintegration." William E. Hocking, Freedom of the Press (Chicago; University of Chicago Press, 1947), pages 122.

[43]See *Roth v. U. S.*, at 485: "This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956 . . ."

[44]"The effect of such 'literature' is to dull the moral sensitivity of many, if not most, of the people who read it. It serves to erode our moral standards and tends to bring about the moral decay of our people. If the time ever comes when the average person, applying contemporary standards, does not look upon such a book as detrimental to the public welfare, it will be a signal that our society has deteriorated to a low level and that our civilization is in danger of collapsing as other civilizations have in the past which have over-indulged their appetites and cast aside decent standards of behavior." *People v. Williamson*, 24 Cal. Rptr. 734, 737 (Nov. 21, 1962).

[45]See Justice Douglas' dissent in *Roth*, at page 512: "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." (Emphasis his.)

it is reasonably certain that this Court will not permit an intrusion on its culture in the form of offensive expression, in open argument.

Certainly the generalities of *Winters v. N. Y.*, 333 U. S. 507 (1948) and *Kingsley International Pictures Corp. v. Regents*, 360 U. S. 684 (1959), cited in ACLU's brief at page 15, are limited to the statutes and interpretations involved and are not authority for their proposition, "that an author should not be punished if he chooses to expound his ideas through the use of 'obscenity'." By definition "obscenity" appeals to lustful interests and emotions. It does not contain ideas of value. It is not in the competitive market place of ideas. It contributes nothing in the search for truth or the development of civilization. In the expression of an idea in the community, obscenity may not be resorted to, any more than scandalous matter may be utilized in argument before this Court. The dignity of the community is no less important than the dignity of this Court. Our culture can and does require that such matters be circulated in appropriate garb.

Unwilling to acknowledge the healthy mantle of precedents which has enriched our heritage, ACLU reaches back into the past (1859) for supporting authority, John Stuart Mill, yet allows no discount for contemporary problems of mass communications, unhealthy competitive pressures[46] and the lucrative and inviting

[46] "In 1939 Pocket Books, Inc. issued the first ten titles in the new industry. That year saw a total of thirty-four titles and a sale of 1,508,000 copies. . . . Today there are approximately twelve hundred titles being published annually with a total annual sale of 300 million copies. As regards the relative rate of growth, in the period 1947-1954, newspaper circulation increased 14%, while books, measured in the number of

half-billion dollar pornographic trade.[47] Rip van Winkle comparisons are often ludicrous when placed in a different setting. The sands of time and unforseen developments have tempered the valuations of many great thinkers.[48] John Stuart Mill, if alive today, would recognize that we do not live in the relaxed calm of the steamboat era.

The very direct conflict of interest which existed in the case of the late Justice Curtis Bok, takes the sharp edge off the sword of ACLU's contemporary refer-

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copies sold increased 58%. . . ." Censorship, Government and Obscenity, by Terrence J. Murphy, *Helicon* Press, 1963, page 82.

[47]Margaret Caulkin Banning, novelist and feature writer, undertook a survey of newsstands for the Readers Digest Magazine. She concluded that, "Most of the newsstands of American do carry a display of sex provocation (in magazines and pocket books) such as to be found nowhere else in the world." She and her co-workers found that in a New York town of 20,000 population there were 1700 magazines which she termed "pictorial prostitution" sold every month. In larger cities in Massachusetts the sales were in about the same proportion. Report of the Select Committee on Current Pornographic Material, House of Representatives, House Report No. 2510, 82nd Congress, 2nd Session 1952, pages 65 to 66. Total cost to produce one popular magazine, that sells for fifty cents, is fifteen cents. A publisher of one such magazine started with an investment of 10,000 and within four years was grossing $3,500,000 a year. Report of the New York State Joint Legislature Committee studying the publication and dissemination of offensive and obscene material 123, 124. Legislative Document No. 85 New York (1958).

[48]Particularly is this so in judicial reasoning. Compare Mr. Justice Holmes' opinion in *Baltimore & Ohio Railway v. Goodman*, 275 U. S. 66 (1927) and his attempt to lay down a standard "once for all," which would require an automobile driver approaching a railroad with an obstructed view to stop, look and listen, and if he cannot be sure otherwise that no train is coming, to get out of the car, with Justice Cardoza's opinion seven years later in *Pokora v. Wabash Railroad*, 292 U. S. 98, 105 (1934), "Illustrations such as these bear witness for the need for caution in framing standards of behavior that amount to rules of law. . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the common-place or normal."

ence;[49] nor can their reference to the comments of the American Law Institute, Model Penal Code, Tentative Draft No. 6, Section 207.10(2) be passed, without calling attention to Justice Bok's influence as a member of the Criminal Law Advisory Committee of the American Law Institute.[50] Except for isolated instances, this minority though vociferous voice has not been accepted

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[49]Justice Curtis Bok's mother was a member of the Board of Directors of the Curtis Publishing Company (which owned 42% of Bantam Books, Inc. stock) and the daughter of its founder. Judge Bok's brother was vice-president and director of the Curtis Publishing Company. The House of Representatives Report of the Select Committee on Pornographic Materials, December 1952, comments at page 7: "It is . . . reasonably possible that having been associated so closely with the publishing business that he became inherently imbued with a liberal conception of the tradition founded upon the constitutional provision guaranteeing the freedom of the press."

[50]Appellant urged the Ohio Supreme Court to reject the *Roth* test as "did the Supreme Court of the Commonwealth of Pennsylvania and the Court of Appeals of New York, . . . for the reason that it is unconstitutionally vague, and for the further reason that it is impractical and unworkable. . . ." See excerpt from said brief appearing in Appendix 10 of appellee's Motion to Dismiss Appeal, at page 67. The late Justice Bok of the Pennsylvania Supreme Court was a member of the ALI Criminal Law Advisory Committee, as also was Justice Fuld of the New York Court of Appeals. Both of these Justices are adherents to the dissenting opinion in *Roth* and have led the "silent revolution" against the existing standards in ruling case law.

Justice Bok's influence has been felt elsewhere. See the opinion of the late Justice Frank in *United States v. Roth*, 237 F. 2d 790 at page 805: "I then had little doubt about the validity of a purely punitive obscenity statute. But the next year in *Commonwealth v. Gordon* (1949), 66 Pa. Dist. & Co. R. 101 Justice Curtis Bok, one of America's most reflective judges, directly attacked the validity of any such punitive legislation. His brilliant opinion, which states arguments that 'so far as I know' have never been answered, nudged me into the skeptical views contained in this opinion and in the Appendix." The overwhelming body of authority is contrary to the position which the drafters and these three judges were seeking to establish. See footnote 5.

into ruling case law. The results achieved, where the revolt has been successful, portend its downfall.[51]

ACLU's brief at page 16 reads, "Based on present day evidence, the improbability of the evils resulting from the conduct suppressed is so great that no invasion of free speech is warranted." (Our emphasis.) The "improbability of evil" thought to be so great, contemplates a self-controlling process in society similar to that accredited to the unrestricted economic market before social reform legislation, and assumes that society can flourish if freedom is protected absolutely. In his work, Zechariah Chafee[52] takes issue on this point and denies that there is a natural balance and harmony in society. The degree of order required for the healthy society is "not the inevitable consequence of freedom per se." In part it is the result of both political and moral effort. Both freedom and order are purchased by self-control *and* public controls.

Further, this statement is completely unsupportable. Its dishonesty is established by both ancient and modern historic fact. Ancient fact is found in the case histories out of which the obscenity statutes have been fashioned. Modern fact is represented by the groundswell of public indignation presently coursing throughout the nation. Its seriousness is tabulated in the workload of obscenity cases which are filling the court sys-

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[51]See the opinion of Justice J. Erwin Shapiro in *People v. Birch*, 243 N. Y. S. 2d 525 (Sept. 6, 1963) involving eight paperbacks, Sex Kitten, Clipjoint Cutie, The Wild Ones, The Hottest Party in Town, Passion Pit, Bedroom at the Top, Butch and College for Sinners. See also footnote 54.

[52]Zechariah Chaffee, Government and Mass Communication (Chicago: University of Chicago Press, 1947) 1, page 27.

tem.[53] This is not, employing a cliche of the literati, the result of "censorship by idiots". Leaders from all walks of life are calling out against the corrosive effects which are being felt in the communities, some of the most vociferous of which are voiced by well-known figures in the literary field (nor have they shut their eyes to the "silent revolution" being sponsored by a minority of the judiciary).[54] One well-known educator

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[53]Despite a filtering process, eight cases have reached this Court and are presently before it for review, October Term 1963, Nos. 11, 72, 95, 99, 246, 289, 330 and 449.

[54]"What is needed on the obscene scene is, in short, less double-talk about censorship and more court action on obscenity." "Paperback Pornography" by Cleveland Amory, Life Magazine 1963, pages 10-12. "Now for various reasons, some of them obviously commercial, eroticism flourishes in our society on a scale never before known, not even during the decadence of imperial Rome. . . ." Speaking Out by J. B. Priestly, Life Magazine 1963, pages 10-12.

"When Nikita Khrushchev visited Hollywood he was shown only one movie set, that of a wild dance scene in Can-Can. He said it represented decadence and I am sure he really thought so. It is a dogma of current Communist faith that America is Sodomon and Gomorrah, ripening for the kill. . . ." Finally there is the status of our entertainment and our literature. Can anyone deny that movies are dirtier than ever? But they don't call it dirt. They call it 'realism'. Why do we let them fool us? . . . ." Address by Jenkin Lloyd Jones editor of the Tulsa, Oklahoma Tribune. "Who is tampering with the soul of America?" Chicago, October 16, 1961. Reprinted in Wisconsin State Journal, October 29, 1961. "New York Supreme Court Justice J. Erwin Shapiro had before him a batch of books which he called, 'profane, offensive, disgusting and plain unvarnished trash.' But refused to call legally obscene. . . . Reluctantly Shapiro felt obliged to read some 25 pieces of lewd trash (Sex Kit, Hill-Billy, Nympho, etc.) and be their critic 'because the law in its present status required just that.' The books all had the same plot (which Shapiro described as 'from puberty to prostitution') . . . The Shapiro doctrine is too permissive and should not survive." "Is any Book Legally Obscene any more", Life Magazine, Sept. 27, 1963, page 8; "The untouchables in modern society are the writers, publishers and salesmen of smut. They have both the money and the opinion-makers on their side . . . and if it is perverted sex, and described fully the critical acclaim not only

has poignantly remarked that we are the first generation of Americans which has *permitted* its writers and playwrights to wallow in filth.[55]

The odor of pornography, which ACLU seeks to make an accepted brother of "free speech" by sterilizing the obscenity statutes, is giving that cherished freedom a monster-like appearance. The "sterling on silver" valuation this nation has always recognized in "free speech" as it relates to our culture, is beginning to take on a tarnished look, a debasing confusion never contemplated. Professor Hocking challenges the ACLU position,[56]

> "If I were personally to challenge one product of a noncontrolled liberty more than another, it would not be the liberty to confuse public debate, nor even the perverse liberty to breathe rancor in the world by maligning an ally or spreading international falsehoods; it would be the liberty to degrade, and especially to degrade the arts, which are man's only religion of self-elevation. I confess I am angry with the defilers of this religion, and still more angry when they bleat 'freedom of the

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hails it as art but as the product of genius. To communicate one's own sick pathology, especially if one is a pervert, is now regarded as the highest art form and the quickest entry into the genius sweepstakes. . . . Recent court rulings all over the country and from the lowest to the highest courts have decreed that anything goes. . . ." Inez Robb, Detroit Free Press, Nov. 6, 1963. "Nor can there be any real doubt that there is a close connection between the suddenness of the increase in sadistic crimes and the new vogue of sadism among mass media of entertainment. . . ." Walter Lippmann writing in New York Herald Tribune, September 7, 1954, page 18.

[55]Statement credited to Maxwell Rafferty, California State Superintendent of Public Instruction.

[56]Hocking, Freedom of the Press (Chicago: University of Chicago Press, 1947) page 192.

> press' to cover their treason. . . . If we reject the aid of the state as incompetent in these matters, we would seem bound to recognize of this common good we call culture that it is at once peculiarly defenseless against wanton assault by the more brutal individual impulses which still claim freedom. . . ."

To add "polish" to the standard is no invasion of free speech. To neglect the "polishing" process by encumbering the restraining processes of law in obscenity cases, as suggested by ACLU, is to damage "Free Speech" by making its presence less attractive.

B. The Ohio (Roth-Alberts) Standards Are Not Vague and Unworkable.

The *Roth* decision is clear that state obscenity statutes, which follow the constitutional standards set forth in that decision, are not vague.[57]

The criticism which has been levied against the *Roth* standards comes from the same small group who even before the *Roth* decision were leading the "silent revolution" away from ruling case precedent. In their view the people themselves are not qualified to speak on the community standards, but, for some unknown reason, the judges are. This is rule "by a bevy of Platonic

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[57] ". . . we hold that these statutes, applied according to the proper standard for judging obscenity, *do not* offend constitutional safeguards against convictions based upon protected material, or *fail to give men in acting adequate notice of what is prohibited.*" *Roth v. U. S.*, 354 U. S. 476, 492. (Our emphasis.) Appellant works this argument at both ends. Here they argued the standards are vague in determining "obscenity". They also argue the standards are vague in "conveying knowledge" to a person who has ascertained (is aware of) the content. It should follow that since the standards are not vague as to the former, they are not vague as to the latter.

guardians,[58] denounced by Judge Learned Hand. Judge Hand regarded the determination of "obscenity" as a jury question. Their dissatisfaction since Roth has been sounder in the semantics of interpretation and construction;[59] now it is a "vagueness" deficiency, next the "clear and present danger" deficiency; and if not one of these, then surely it is the "hard-core pornography" attack. It appears as a rare case indeed, when one of these interpretations is arrived at out of honest confusion.[60]

C. The Roth-Alberts Standards Do Not Limit the Proscription of State Obscenity Statutes to the Suppression of "Hard-Core Pornography" Only.

Appellant argues that the *Roth* test established "hard-core pornography" as the standard. ACLU's attack is more general, citing the same case material as appellant, but suggesting only that this Court has strictly limited

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[58]No more serious case of censorship can hardly be imagined. Not only do they choose to deny the people the right to "speak out" on community standards, but in their action they would settle this issue on a *majority* vote of the Platonic Guardians in preference to the *unanimous* decision required of the jury panel in the community.

[59]Leaders in this area are Professors Lockhart and McClure, referred to in the *Roth* dissent as "our outstanding authorities on obscenity". 354 U. S. 476, 510. See 38 Minn. L. Rev. 295 (1954) and 45 Minn. L. Rev. 5 where the *Roth* standard is energetically analyzed but not in sympathy with the majority opinion. The *Roth* standard is simple of understanding when applied as intended by Judge Learned Hand. (*i.e., ad hoc* legislation.)

[60]"There is no difficulty in distinguishing between books; the impulse behind which is literary and those whose impulse is pornographic. Any man with a modicum of literary knowledge can do so without hesitation. Huntington Cairns "Freedom of Expression in Literature" annals of American Academy of Political and Social Science. (November 1938) page 87.

obscenity *convictions*[61] by the lower courts. Our answer is that the *Roth* test does not establish such a standard, nor do the 1958 decisions referred to, stand for the proposition that the subject matter involved was not obscene.

Nowhere is the word "hard-core pornography" referred to in the majority opinion of *Roth v. U. S.*[62] The separate opinion of Justice Harlan referred to hard-core pornography, but only with reference to the federal authority, and that, because of his differing view as to the authority of the federal and state governments in the area of obscenity.[63]

The concept that only "hard-core" material is prohibited by *Roth-Alberts* is a seduction espoused by the Kronhausens and certain commentators, with roots entangled in an erroneous interpretation of the 1958 "per curiam reversals" of this Court.[64] Professors

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[61]Brief for Appellant, page 36. ACLU Brief, page 18 and footnote 12. The cases cited were not "convictions" as that term is understood in its primary sense (the ascertainment of guilt in a jury criminal proceeding). More properly, and important to their correct interpretation, they must be recognized as final *judgments* arrived at in civil proceedings, involving the more complex collateral issue of "prior restraint."

[62]Forgotten is the interpretation given *Roth* by the dissent of Justices Douglas and Black at page 512: "It creates a regime wherein the battle between the literati and the Philistines, the Philistines are certain to win. . . ."

[63]If Justice Harlan adheres to his views in *Alberts v. California*, 354 U. S. 476, 503, 506, appellant is concluded, having had his full day in the state court. Hard-core or not, that is not one of Justice Harlan's values in state cases.

[64]Certiorari was granted in four cases: *Times Film Corporation v. Chicago*, 355 U. S. 35 (movie, "The Game of Love"), *One, The Homosexual Magazine, v. Olesen*, 355 U. S. 371 (homosexual magazine); *Sunshine and Health and Sun Magazine v. Summerfield*, 355 U. S. 372 (nudist magazines); and *Mounce v. U. S.*, 355 U. S. 180 (nudist magazines, text in foreign languages). The cases were summarily reversed without

Lockhart and McClure write in 45 Minn. L. Rev. 5, 34, "In three of the four cases the Court must have made an independent examination of the materials and found that censorship of the materials violated constitutional requirements, for in these three cases the Court simply 'reversed' the court of appeals."

These commentators, whose views incline to the *Roth* dissent, saw no substantial issue other than the review by this Court of the issue of "obscenity". They regarded the materials as non hard-core, and the reversals on that ground. From this they argue that this Court must have been thinking "abstractly" of "hard-core pornography" when it spoke of "obscenity" in *Roth*. These three cases, however, involved substantial issues besides the obscenity issue. Both "obscenity" and "procedural due process" issues were involved, all of these being proceedings before an administrative body rather than criminal trials before the judiciary, as in *Roth-Alberts*.

Those decisions which have read the "hard-core pornography" concept into *Roth* have done so in reliance upon this misguided interpretation concerning the 1958 "per curiam reversals". Had Justice Desmond not misconstrued the 1958 *per curiam* decisions[65] in *People v. Richmond County News*, 175 N. E. 2d 681 (1961)

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argument. See Supreme Court Practice, Stern and Gressman, Sections 5-12 at pages 186-187 for factors to be considered in such cases.

[65]At page 688, Justice Desmond said in his opinion: "The inquiry for the court, therefore, is whether the publication is so entirely obscene as to amount to hard-core pornography. Virtuous adults will reject it (*as all of us judges would, were we not restrained by the Roth-Alberts legal test*). . . ." (Our emphasis.) His vote would have made the dissenting opinion, the majority opinion.

the "hard-core" rule would not have found its way into New York law.

In the 1958 *per curiam* reversals, the prior restraint impediments involved were major considerations which, together with the failure to try the issue of "obscenity" before the proper fact finder (to insure due process to the disseminator), make it impossible to assess any one reason for the Court's judgment in those cases. These hidden issues were not recognized until subsequent decisions were handed down *with opinions.*

A re-evaluation of the 1958 *per curiam* reversals is required after *Times Film Corporation v. Chicago,* 365 U. S. 667 (1961); *Marcus v. Kansas City Search Warrants,* 367 U. S. 717 (1961); *Manual Enterprise, Inc. v. Day,* 370 U. S. 478 (1962); and *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58 (1963). These opinions unearthed substantial factors[66] which were concealed when this Court decided the 1958 cases without opinion.

Times Film Corporation v. Chicago, 365 U. S. 667 (1961) unearthed two issues involved in the 1958 movie licensing case, *Times Film Corporation v. Chicago,* 2 L. Ed. 2d 72 (1958); the authority of the censor who acts outside the court-room (here the Chicago Movie Censoring Board) and, assuming such authority exists, the proper procedures to be employed. Justices Clark, Harlan, Frankfurter, Stewart and Whitaker held the power existed *if* proper standards (procedures) were employed. Justices Brennan, Warren, Black and Doug-

[66]The major issue involved on review appeared to be not the factual issue of whether the material was or was not obscene, but rather had the subject matter been exposed to the proper forum under proper procedures? Had the exhibitor had his full day in court? If this assessment is correct, then the *Roth* cases and all subsequent decisions are consistent.

las thought no such prior restraint power exists. This case suggests that the standards (procedures) employed in the 1958 *Times Film* case were bad.[67]

Marcus v. Kansas City Search Warrants, 367 U. S. 17 (1961) unearthed another factor involved in the 1958 federal postal cases. In the *Marcus* case a long delay was involved after a mass seizure under a general search warrant. This Court revealed for the first time it would enter a reversal as a penalty even though the material might be obscene.[68] Where a censor acts outside the court-room and where proper procedural safeguards are not adhered to, this Court will not even get to the "obscenity" issue. In such a situation, this Court did not equate "obscene" matter to heroin (contraband). This explains the return of the materials in the 1958 cases.

Manual Enterprises, Inc. v. Day, 370 U. S. 478 (1962) discussed another issue which lay dormant in the two 1958 decisions which involved the postmaster—the authority of the postmaster censor who acts outside the

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[67]A review of the procedures under the Chicago ordinance set forth in the opinions of the lower federal courts, 139 F. Supp. 837 (1956) and 244 F. 2d 432 (1957) and in the more recent case, *Zenith International Film Corp. v. Chicago*, 291 F. 2d 785 (1961), involving "The Lovers", indicates the procedures very likely were bad under judicial standards and that this was the primary reason for the 1958 reversal. The Chicago ordinance was revised on December 27, 1961 as a result of the *Zenith* decision. See the article, "Obscenity, Pornography and Censorship", by Thomas R. Mulroy of the Illinois Bar appearing in American Bar Association Journal, September 1963.

[68]At page 1140: "*We have no occasion to reach the question of the correction of the finding that the publications are obscene.* . . Since a violation of the Fourteenth Amendment infected the proceeding, in order to vindicate appellant's constitutional rights, the judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion." (Our emphasis.)

court-room. Justices Brennan, Warren and Douglas thought a postmaster had no such power under the federal statutes. Justices Harlan, Stewart and Clark felt the power existed.

In *Bantam Books, Inc. v. Sullivan,* 372 U. S. 58 (1963) this Court made it clear that the proper method of controlling "obscenity" was by criminal prosecution.[69] (The weakness of the 1958 cases—the 1958 *per curiam* reversals were not criminal prosecutions. They involved civil actions forced upon the disseminator.)

The use of "hard-core pornography" in preference to the more widely understood term "obscenity" can serve no purpose other than to compound what appears to be seeming confusion but is, in reality, a continuing struggle between those who support "case precedence" and those who support the "silent revolution". Whether material is pornography or obscenity is a matter of semantics. No clearer example of this can be had than by studying the case histories of Tropic of Cancer in the California and in the New York courts.[70]

The court below said in describing "The Lovers." "Les Amants" was not hard-core pornography, *i.e.*,

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[69]"In thus obviating the need to employ criminal sanction, the state has at the same time eliminated the safeguards of the criminal process. *Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process.*" (Our emphasis.)

[70]While the California statutes has been interpreted to codify the *Roth* decision, the California Supreme Court in a 7-0 decision held Tropic of Cancer not to be obscene because not "hard-core pornography." In New York where the "hard-core pornography" rule is said to be the law, independent of Roth, the New York Court of Appeals in a 4-3 decision held Tropic of Cancer to be obscene, because it was "hard-core pornography."

filth for filth's sake. *It was worse.* It was filth for money's sake. The producers, distributors and exhibitors *exhibited so little responsibility in connection therewith* that they have no right to assert constitutional guarantees which require a high degree of responsibility from those who seek their protection." (Our emphasis.) This is no less than a statement by the court that the film was so clearly obscene the court considered the proffered claim of non-obscenity to be a sham.

VI.

The Determination of "Obscenity" Is Primarily an Issue of Fact to Be Tried by a Jury (Unless Waived. Constitutional Review Is Limited to the Question "Whether Reasonable Minds Could Differ Beyond a Reasonable Doubt That 'The Lovers' Is Obscene."

A. The Determination of "Obscenity" Is Primarily an Issue of Fact to Be Tried by a Jury.

The pre-Roth precedents, and the Roth test, by its very definition, pose a factual (jury) question.

Historically the "constitutional standard" expressed by Justice Brennan in *Roth* had its genesis in an opinion written by Judge Learned Hand, *United States v. Kennerley,* 209 Fed. 119 (S. D. N. Y. 1913), often called the "architect" and "father" of modern obscenity law.[71] In that decision, Judge Learned Hand disap-

[71] Twenty-one years later in *United States v. One Book Entitled Ulysses by James Joyce,* 72 F. 2d 705 (1934), a two-to-one decision in the Circuit Court of Appeals, Second Circuit, Judge Learned Hand joined with Judge Augustus Hand to establish "dominant effect" as one of the measuring sticks for obscenity in a case of major importance. The decisions in between *Kennerley* (1913) and *Roth* (1959) which used the "average man" and "predominant appeal" test cite Judge Learned Hands' early decision in *Kennerley.*

proved of the rule in *Regina v. Hicklin*, L. R. 3 Q. B. 36, and originated the rule that the determination on "obscenity" was a jury question, drawing an analogy to the standard of care in negligence cases, as a jury question.[72]

Kennerley's general demurrer to a federal indictment for placing an obscene book in the mails raised the question whether the issue of "obscenity" as applied to the book "Hagar Revelly"[73] was a question of fact for the jury or a question of law for the Court. Judge Hand, in overruling the demurrer and requiring Kennerley to stand trial, ruled that the "obscenity" issue was for the jury to decide.[74]

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[72]At page 121,

". . . If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a *jury* should in each case establish the standard much as they do in cases of negligence. . . .

"Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A *jury* is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctly from life and common speech." (Our emphasis.)

[73]The book was made a part of the record by a Bill of Particulars and by stipulation. Kennerley's demurrer raised the question *before* the actual criminal trial as to whether the book was obscene. The question is raised in this case *after* the criminal trial and *full state court review* of the motion picture film. The test should be the same.

[74]At page 120,

"Whatever be the rule in England, in this country the *jury* must determine under instructions whether the book is ob-

Judge Learned Hand, speaking for the Circuit Court of Appeals in *United States v. Levine* (1936), 83 F. 2d 156, 157, in a criminal prosecution for mailing obscene circulars, called the verdict on "obscenity," a "small bit of legislation *ad hoc*, like the standard of care" which the court imposes upon a jury as a "duty."[75]

Justice Brennan confirmed the pre-*Roth* precedents in his majority opinion in *Roth v. United States* (*supra*)[76] and in his separate opinion in *Kingsley Book Inc. v. Brown*, 360 U. S. 684 (1957),[77] pointing out

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scene. The court's *only power* is to decide whether the book is so clearly innocent that the *jury* should not pass upon it at all. . . ." (Our emphasis.)

[75]The *Levine* case was cited in *Roth* at footnote 26 as consistent with the obscenity law expressed therein. Learned Hand said in *Levine* at page 157,

"'As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. *We impose such a duty upon a jury (Rosen v. United States, supra*, 161 U. S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really *a small bit of legislation ad hoc, like the standard of care.*" (Our emphasis.)

[76]Justice Brennan, speaking for the majority, cited with approval a jury instruction given in the *Roth* prosecution in the trial court, at page 1510, to the effect that "In this case, ladies and gentlemen of the jury, you and you alone are the *exclusive* judges of what the common conscience of the community is. . . ." (Our emphasis.) In the companion criminal case of *Alberts v. California*, both the People and the defendant had waived their right to trial by jury.

[77]At page 1478, "in *Alberts v. California*, and *Roth v. United States*, decided today, 1 L. Ed. 2d 1498, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interests. . . .

that the constitutional standard for judging obscenity, by its definition, calls for a jury trial and a factual determination.

B. Constitutional Review Is Limited to the Question "Whether Reasonable Minds Could Differ Beyond a Reasonable Doubt That 'The Lovers' Is Obscene."

The constitutional inquiry should look only to the "reasonableness" of the factual determination, *i.e.*, "whether reasonable minds might differ that the material is obscene."

Pre-Roth case law provides absolutely no support for expanded review by the Federal Courts. See here a host of cases to the contrary appearing in the extensive annotation following *United States v. Limehouse*, 285 U. S. 426 (decided April 11, 1932), entitled "Respective Functions of Court and Jury in Determining Criminality vel non of Matter." In *Kennerley* (*supra*) Judge Hand said, "The court's *only power* is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *United States v. Clark* (D. C.), 38 Fed. 500; *United States v. Smith* (D. C.), 45 Fed. 478. The same question arises as would arise upon motion to direct a verdict at the close of the case. . . . The question here is, therefore, whether the jury might find the book obscene under proper instructions."[78] (Our emphasis.)

"The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, *by its definition*, calls for an appraisal of material according to the average person's *application* of contemporary community standards. . . ." (Our emphasis.)

[78]209 Fed. Rptr. 119, 120.

The reporter's notes to the 1957 draft of the A. L. I Model Penal Code record at page 16 the results reached in prior case law:

> "13. *Obscenity As Fact or Law; Role of Court.* Whether material is 'obscene' is plainly one of those issues of mixed law and fact, usually submitted to the jury with instructions from the court as to applicable law, unless the judge withholds the case from the jury on the ground that the evidence could not support a conclusion of guilty. ***Any tendency to stray from this line has been in the direction of authorizing the court, where there is no dispute as to the content of the material, to instruct the jury that it is obscene as a matter*** of law. . . ." (Our emphasis.)

Justice Brennan, author of the majority opinion in *Roth* stated his view very clearly in *Kingsley Book, Inc. v. Brown*, 360 U. S. 684 (1957), that in reviewing the subject matter, before a trial of the issue, the Court merely satisfied itself a jury question was present, *i.e.*, that "reasonable men may differ whether the material is obscene."[79] Whether the court's "review" takes place before trial of the issue in a declaratory judgment civil action (as in *Kingsley Book Inc. v. Brown, supra*), or in the "review" of a state conviction after a criminal obscenity prosecution (as in this case), the scope of

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[79]This seems to be the same test applied by Judge Learned Hand. See note 74. Justice Harlan alone of this present Court has voiced an inclination to learn beyond this. See Justice Stewart's opinion in *Volanski v. United States*, 246 F. 2d 842, 845. Even Justice Black in *Kingsley v. Regents of University of New York*, 360 U. S. 684, 689, voiced the opinion that if censorship was to be the rule, the United States Supreme "Court is about the most inappropriate Supreme Board of Censors that could be found. . . ."

"review" should be the same, *i.e.*, "whether reasonable minds might differ that the material is obscene."

The reasoning behind the limited review seems apparent; by definition the *constitutional standard* depends upon an appraisal of material by a jury—the average person's application of contemporary community standards. The Seventh Amendment[80] to the Federal Constitution precludes a *Federal Court*[81] from re-examining these facts which are tried by a *jury* in a state court.[82]

The public policy supporting limited review in the area of "obscenity" is even more apparent. Judge Learned Hand viewed the court's usurpation of this inherent right of the People as an evil, "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them

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[80]". . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Amendment VII (1791) of the Constitution of the United States.

[81]The right of a state court to reexamine jury determinations may be greater than the right of a federal court to reexamine the same jury determinations (the federal court is bound by the state court's interpretation of the state statute), see *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, (footnote 82). See also *Bradley Reed Smith v. California*, October Term, 1963, No. 72, remanded to the Los Angeles Superior Court on Dec., 16, 1963 for consideration in the light of *Zeitlen v. Arnebergh*, 31 Cal. Rptr. 800. Tropic of Cancer remains outside the protection of the First Amendment in the State of New York by virtue of this Court's action in the *Bradley Reed Smith* case (a jury determination).

[82]"It is clear that the last clause of the seventh amendment, is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally well to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 240.

which I assuredly do not. . . . ."[83] Judge Learned Hand gave insight to his decisions, which restricted the role played by the courts in measuring what is obscene. "It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. On such issues experience has over and over again shown the difficulty of securing unanimity. This is disastrous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure they will not be caught."[84]

Justice Harlan's view that "the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind," is no comfort to appellant in this case because of Justice Harlan's differing approaches to state and federal cases. This review involves an Ohio conviction which has been given the full support of that sovereign state's judicial system.

Appellant chose to follow the pattern followed by most defendants in obscenity cases[85] and waived his right to a trial of the facts by a jury. That the trial judges performed the dual role of trying both law and fact should not permit the respective functions

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[83]Hand, the Bill of Rights, Harvard University Press (1958), at page 73.

[84]*Id.* at p. 72.

[85]45 Minn. L. R. 5, 109, fn. 596.

of the jury and the court to take on aberrations and remain out of focus on appeal. That the issue of "obscenity" was tried by a three judge court should not confer upon appellant any rights greater than those accorded to him under a jury trial."

Conclusion.

The order appealed from should be affirmed as set forth in this brief.

Respectfully submitted,

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